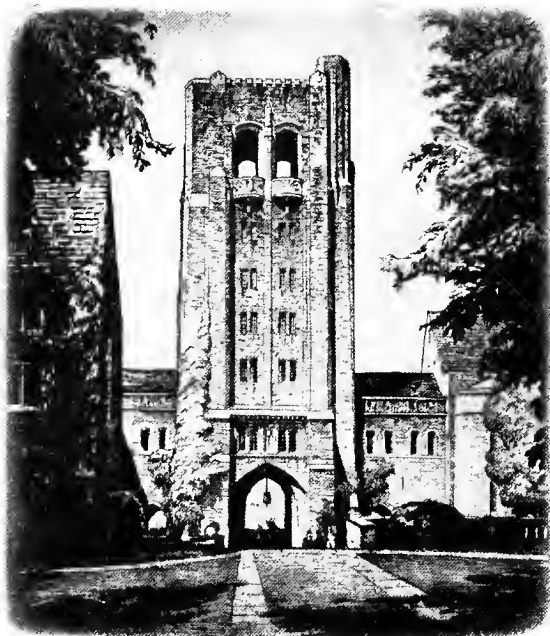




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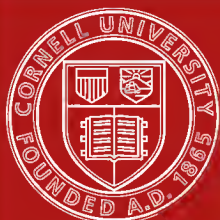
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A TREATISE  
ON  
COVENANTS WHICH RUN WITH LAND  
OTHER THAN  
COVENANTS FOR TITLE

BY  
HENRY UPSON SIMS  
OF THE BIRMINGHAM (ALA.) BAR

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TO  
JOHN CHIPMAN GRAY, Esq., LL.D.  
OF THE BOSTON BAR  
ROYALL PROFESSOR OF LAW IN  
HARVARD UNIVERSITY

THIS ESSAY IS DEDICATED, WITH HIS CONSENT, IN GRATEFUL RECOGNITION OF  
HIS EFFORTS IN AIDING THE AUTHOR AND HIS FELLOW STUDENTS  
TO AN UNDERSTANDING OF THE LAW OF REAL PROPERTY





## PREFACE.

---

For a long while there was a general impression in this country that the power to charge real property with the burden of agreements affecting its use would be very unfortunate, as it must hamper the transmission of land, and operate as an impediment to commerce. And where such agreements are incautiously made, there is much to support the opinion that they are dangerous. But in recent years, it has become evident that the free changing of property and the shifting of titles, which it was formerly so plausibly desired to advance, has worked in some instances more hardship than where its exchange is rendered more difficult. As cities increased in number and size, and land and building came to involve great sums of money, it began to appear that the continued use of property in a particular locality for the same purpose was a very important element in the value and desirability of an investment. It became important as well to the public in making outlays in local improvements, as to the individuals who expended their money upon the confidence that their buildings could have a permanent use for the purpose for which they were built. Thus later in the building of new towns of great promise, and in the building of great houses in old towns, it became desirable to have some guaranty that the uses to which localities were assigned should be permanent.

The importance of these matters was recognized long ago in old countries, and their laws grew into a shape pretty well calculated to effect justice. But in America nearly all localities were so new, and land was so plentiful, that there was

little appreciation of the importance of permanency in real property values until irreparable damage was suffered.

It is apparent that our legal profession has been too little mindful of the relation between the principles upon which the law of real property rests and the principles governing the agreements which may be entered into by property-holders to affect their possessions. But with a former commercial antipathy to the existence of any connection between agreements and the use of property, lawyers and judges have not had much occasion to inform themselves upon the questions involved; and their overlooking them is not surprising. Moreover, the law has been very difficult to study, as early American precedents were rare, and the early English law was in great confusion owing to the various interpretations put upon yet older English authorities.

While there were several means through which the old law affected the use of property by agreement of the parties,—sometimes by stipulations or conditions, sometimes by the reservation or granting of easements, sometimes by formal agreements called covenants,—all but covenants were by nature so limited in their scope that they were of little service to carry out what the parties often desired. Covenants, therefore, for more than a hundred years have been used in English law to express the purposes of the parties; and at once the question became very important how far these covenants could attach to the land so as to bind those who were successors in title to the property-holders who made the agreements.

The law upon covenants that run with land in all recent times has been acknowledged to be in a very chaotic state; and it is with a view to seeing what it was historically, that this work has suggested itself. The author has come to believe that covenants are properly used to affect property in the hands of successors to the titles of covenanting parties, as well where the land is burdened as where the land is bene-

fited; and that the modern English doctrine supported by some American courts, greatly curtailing the running of the burdens of covenants, is probably based upon a misinterpretation of the Common Law.

It is therefore desired to convince the reader that covenants should run more broadly with the land than was conceived by the learned editors of Smith's Leading Cases in their notes to Spencer's Case; and after showing that the American law generally sustains a broader running of covenants, to add some historical reasons for the soundness of the American decisions.

It is not pretended that these chapters shall present exhaustive research into the depths of the law. Such a labor the reader will hardly think necessary. Nor would he be warranted in giving time to the following of such a pursuit except in the wake of great scholars. It would seem necessary, however, to examine the law ourselves through the decisions in the Year Books, as this seems never to have been done for us. But for the early law that brought about these decisions, it is enough to rely upon the conclusions gathered by such writers of the early day as Bracton, or better, those gathered by such students of the present day as Sir Frederick Pollock, Mr. Maitland, or Mr. Justice Holmes. Indeed the collateral work of such scholars can hardly be overvalued even in the study of later decisions; for one should be ever mindful that the decisions as we have them from the time of King Edward the First are mere summarized statements which are to be compared rather by their general drift than by their line of reasoning. They are more useful than our own decisions because they are of a time nearer the rise of the principles, and so likely to contain them; but the judges who made those decisions were often more ignorant of the sources of the law than we are to-day. Even the great Bracton, writing about the middle of the thirteenth century, came long enough after the law had

begun to crystallize to make grave mistakes in its course, to say nothing of his tendency to throw over the whole a too great shadow of the Roman law caught in his study of the works of Azo of Bologna, the great Italian master of Civil and Canon Law.

It has seemed unavoidable to ask the reader to examine the Year Books himself as far back as Edward the First; for Coke, the chief author on whom we generally rely, has given way to an ever ready tendency to invent reasons for what he found to be strange, however inaccurately they approached what has been found to be the historical truth, and since his day the decisions and commentaries have done little more than reflect his comments. To one writer on the history of covenants, however, the reader will find himself indebted for very great assistance. Mr. Justice Holmes in his invaluable lectures on "The Common Law" has given us a theory of covenants running with the land leading to a conclusion which cannot be far from the truth. But the lectures of course were not intended to be of much use to the practitioner, and so serve only as a basis for farther work.

As the running of covenants is primarily a question of common law, rather than of equity, and as the American courts have gone farther than the English in allowing the operation of covenants at common law, more space has been given to the investigation of their status in common law courts. But for the aid of any persons seeking the law in jurisdictions confining the rights to equity, the English doctrine of equitable easements has been discussed; and in either branch a collection of all the cases has been attempted.

Moreover for the sake of completeness, a chapter on covenants in leases and their operation under the Statute of 32 Henry VIII, Chapter 34, has been inserted.

The author acknowledges helpful criticism from Mr. John Chipman Gray and from Mr. James De Witt Andrews.

Birmingham, Alabama, July 4, 1900.

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# LIST OF ABBREVIATIONS.

## ENGLISH AND IRISH REPORTS.

A. C.....	Appeal Cases, House of Lords and Privy Council.
A. & E.....	Adolphus & Ellis, Queen's Bench.
Amb. ....	Ambler, Chancery.
Atk. ....	Atkyns, Chancery.
B. & Ald.....	Barnwall & Alderson, King's Bench.
B. & B.....	Broderip & Bingham, Common Pleas.
B. & C.....	Barnwall & Cresswell, King's Bench.
B. & S.....	Best & Smith, Queen's Bench.
Bing. N. C. ....	Bingham's New Cases, Common Pleas.
Bridgman's Judgments	(Sir Orlando)..... Common Pleas.
Brooke, Abr. Cov.....	Brooke's Abridgment of Year Books, subject of Covenant.
Brooke, Ass.....	Brooke's Assizes.
Brooke, Gar.....	Brooke's Abridgment, subject of Warranty.
Brooke, N. C.....	Brooke's New Cases.
Brooke, Vouch.....	Brooke's Abridgment, subject of Vouchers.
Brownl. ....	Brownlow's Reports (early).
Bulst. ....	Bulstrode's Reports (early).
C. B.....	Common Bench, Common Pleas.
Ch. ....	Law Reports, Chancery.
Ch. '9—, or [189—] Ch.....	Law Reports [189—], Chancery.
Ch. D.....	Chancery Division.
Chitty .....	Chitty, King's Bench.
C. M. & R.....	Crompton, Meeson & Roscoe, Exchequer.
C. & M.....	Crompton & Meeson, Exchequer.
Co. ....	Coke's Reports, Queen's Bench.
Comb. ....	Comberwell (early).
C. P. D.....	Law Reports, Common Pleas Division.
Cro. Car.....	Croke's Reports under Charles I.
Cro. Eliz.....	Croke's Reports under Elizabeth.
Cro. Jac.....	Croke's Reports under James I.

D. & L.....	Drury & Lowndes.
De G. M. & G.....	De Gex, Macnaughten & Gordon, Chancery.
Doug. ....	Douglas, King's Bench.
Dyer. ....	Dyer (early).
East .....	East, King's Bench.
E. & B.....	Ellis & Blackburn, Queen's Bench.
Eq. ....	Law Reports, Equity, Chancery.
Eq. Cas. Abr.....	Equity Cases Abridged (early).
Ex. ....	Exchequer Reports.
Fitz. Abr.....	Fitzherbert's Abridgment of the Year Books.
Hardres. ....	Hardres' Reports (early).
H. Bl.....	Henry Blackstone, Common Pleas.
H. & N.....	Hurlston & Norman, Exchequer.
H. L. C.....	House of Lords Cases.
Hob. ....	Hobart's reports (early).
Ir. '9—, or [189—], Ir.....	Irish Reports.
Ir. C. L., N. S.....	Irish Common Law, New Series.
Jones Ir. Eq.....	Jones' Irish Equity, Chancery.
Kay. ....	Kay, Chancery.
Keen. ....	Keen, Chancery.
Keilway. ....	Keilway's Reports (early).
Lev. ....	Levinz's Reports (early).
L. J. Ch.....	Law Journal Reports, Chancery.
Lofft. ....	Lofft's Reports.
L. R. C. P.....	Law Reports, Common Pleas.
L. R. Ex.....	Law Reports, Exchequer.
L. R. Q. B.....	Law Reports, Queen's Bench.
L. Raym.....	Lord Raymond, King's Bench and Common Pleas.
M. & K.....	Milne & Keen, Chancery.
Mod. ....	Modern Reports (early).
Moore. ....	Moore's Reports (early).
M. & Sel.....	Maule & Selwyn, King's Bench.
M. & W.....	Meeson & Welsby, Exchequer.
P. C.....	Law Reports, Privy Council.
Phill. ....	Phillips, Chancery.
Pollexfen.....	Pollexfen's Reports (early).
Q. B.....	Queen's Bench Reports.
Q. B. '9—, or [189—], Q. B.....	Law Reports [189—], Queen's Bench.
Q. B. D.....	Queen's Bench Division.
Roll. ....	Rolle's Reports (early).
Salk. ....	Salkeld's Reports (early).
Sim. ....	Simon, Chancery.
Sim. & Stu.....	Simon & Stuart, Chancery.



T. R.....	Durnford & East's Term Reports, King's Bench.
Tyr. ....	Tyrwhitt, Exchequer.
Ves. or Ves. Jr.....	Vesey, Junior, Chancery.
Vern. ....	Vernon's Reports (early).
Wils. ....	Wilson's Reports.
Wms.' Saund.....	Sergeant Williams' Edition of Saunders' Reports (early).
W. R. '93.....	[1893], Weekly Reporter.
Y. B.....	Year Books, Reports Under the Early English Kings.
Y. & C.....	Younge & Collyer, Equity Cases in the Exchequer.

## AMERICAN REPORTS.

Abb. N. C.....	Abbott's New Cases, New York.
Ala. ....	Alabama Reports.
Allen. ....	Allen's Reports, Massachusetts.
Ark. ....	Arkansas Reports.
Atl. Rep.....	Atlantic Reporter.
Barb. ....	Barbour's Reports, N. Y. Law.
Barb. Ch.....	Barbour's Reports, Chancery, N. Y.
Blkf. ....	Blackford's Reports, Indiana.
Brad. ....	Bradwell's Reports, Illinois.
Browne ....	Browne's Reports, Penna.
Bush ....	Bush's Reports, Kentucky.
Cal. ....	California Reports.
Clark. ....	Clarke's Reports, New York.
Clark., Ch.....	Clarke's Reports, Chancery, N. Y.
Comst. ....	Comstock's Reports, N. Y.
Conn. ....	Connecticut Reports.
Cow. ....	Cowen's Reports, N. Y.
Cr. C. C.....	Cranch's U. S. Circuit Ct. Reports.
Curtis. ....	Curtis' U. S. Circuit Ct. Reports.
Cush. ....	Cushing's Reports, Mass.
Dall. ....	Dallas' Reports, U. S. Supreme Ct.
Daly ....	Daly's Reports, New York.
D. & B.....	Devereux & Battle's Rep. Nor. Car.
E. D. Smith.....	E. D. Smith's Reports, New York.
Edw. Ch.....	Edwards' Chancery Reports, New York.
Fed. Rep.....	Federal Reporter.
Fla. ....	Florida Reports.
Ga. ....	Georgia Reports.
G. & J.....	Gill & Johnson's Reports, Maryland.
Gray. ....	Gray's Reports, Mass.

Halst. ....	Halstead's Reports, New Jersey.
Harrington. ....	Harrington's Reports, Delaware.
Heisk. ....	Heiskell's Reports, Tennessee.
Hilton ....	Hilton's Reports, New York.
How. ....	Howard's Reports, U. S. Supreme Court.
How. Pr. ....	Howard's Practice Reports, N. Y.
Hump. ....	Humphrey's Reports, Tenn.
Hun ....	Hun's Reports, New York.
Ill. ....	Illinois Reports.
Ill. App. ....	Illinois Appeals Reports.
Ind. ....	Indiana Reports.
Ind. App. ....	Indiana Appeals Reports.
Iowa. ....	Iowa Reports.
J. & S. ....	Jones & Spencer's Reports, N. Y.
Johns. ....	Johnson's Reports, N. Y.
Kan. ....	Kansas Reports.
Ky. ....	Kentucky Reports.
La. Ann. ....	Louisiana Annual Reports.
Lea. ....	Lea's Reports, Tennessee.
Mass. ....	Massachusetts Reports.
Md. ....	Maryland Reports.
Me. ....	Maine Reports.
Met. ....	Metcalf's Reports, Mass.
Mich. ....	Michigan Reports.
Minn. ....	Minnesota Reports.
Miss. ....	Mississippi Reports.
Mo. ....	Missouri Reports.
Mo. App. ....	Missouri Appeals Reports.
N. C. ....	North Carolina Reports.
Neb. ....	Nebraska Reports.
N. E. Rep. ....	North Eastern Reporter.
Nev. ....	Nevada Reports.
N. H. ....	New Hampshire Reports.
N. J. L. ....	New Jersey Law Reports.
N. J. Eq. ....	New Jersey Equity Reports.
N. Y. ....	New York Reports.
N. Y. St. Rep. ....	New York State Reporter.
N. Y. Super. Ct. ....	New York Superior Ct. Reports.
N. Y. Supp. ....	New York Supplement.
O. C. C. ....	Ohio Circuit Ct. Reports.
O. Dec. ....	Ohio Decisions.
O. St. ....	Ohio State Reports.
Ont. ....	Ontario Reports.
Pac. Rep. ....	Pacific Reporter.
Paige. ....	Paige's Reports N. Y. Chancery.
Pa. ....	Pennsylvania Reports.

Pa. Co. Ct.....	Pennsylvania County Ct. Reports.
Pa. Dist. Ct.....	Pennsylvania District Ct. Reports.
Pet. ....	Peters' Reports, U. S. Supreme Ct.
Pick. ....	Pickering's Reports, Mass.
Phila. ....	Philadelphia Reports.
Rawle. ....	Rawle's Reports, Penna.
R. I.....	Rhode Island Reports.
Rich. ....	Richardson's Reports, So. Car.
Sandf. ....	Sandford's Reports, New York.
S. & R.....	Sergeant & Rawle's Reports, Penna.
S. C.....	South Carolina Reports.
S. W. Rep.....	South Western Reporter.
Taylor ....	Taylor's Reports, Nor. Car.
Tex. ....	Texas Reports.
Th. Cas.....	Thompson's Cases, Tenn. Chancery.
U. S.....	United States Supreme Ct. Reports.
U. S. App.....	United States Court of Appeals Reports.
Va. ....	Virginia Reports.
Vt. ....	Vermont Reports.
Wall. ....	Wallace's Reports, U. S. Supreme Ct.
Wash. C. C.....	Washington's U. S. Circuit Ct. Reports.
W. & S.....	Watts & Sergeant's Reports, Penna.
Wend. ....	Wendell's Reports, New York.
Wis. ....	Wisconsin Reports.
Wkly. Law Bul.....	Weekly Law Bulletin, Ohio.
W. N. C.....	Weekly Notes of Cases, Penna.
Wright. ....	Wright's Reports, Ohio.
W. Va.....	West Virginia Reports.
Yates. ....	Yates' Reports, Penna.

## TEXT BOOKS.

Bac. Abr.....	Bacon's Abridgment of the Law.
Bl. Com.....	Blackstone's Commentaries on the Laws of England.
Bract. ....	Bracton de Legibus et Consuetudinibus Angliæ.
Co. Lit.....	Coke's Institutes, or Commentaries upon Littleton.
Com. Dig., Vouch.....	Comyn's Digest of the Laws of England, under subject of Voucher.
F. N. B.....	Fitzherbert's Natura Brevium.
Fleta. ....	seu Commentarius Juris Anglicani.
Glan. ....	Glanville de Legibus.
Gray Cas. Prop.....	Gray's Cases on the Law of Real Prop- erty.

Hist. Eng. Law.....	History of Early English Law, Pollock and Maitland.
H. C. L.....	The Common Law, Holmes.
Kent Com.....	Kent's Commentaries.
Lit. ....	Littleton's Tenures of England.
Note Book. ....	Bracton's Note Book.
Pol. & Mait.....	History of English Law, Pollock and Maitland.
Rawle Covts.....	Rawle's Covenants for Title.
Shep. Touch.....	Sheppard's Touchstone.
Smith, L. C.....	Smith's Leading Cases, edited.
Sugden V. & P.....	The Law of Vendors and Purchasers, Sugden (Lord St. Leonards).
Vin. Abr. Sup.....	Supplement to Viner's Abridgment.

## GENERAL.

Hil. ....	Hilary Term of the English Courts.
Mich. ....	Michaelmas Term of the English Courts.
R. S.....	Revised Statutes.
S. C.....	Same Case.

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## INTRODUCTION.

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We are taught to believe that the peculiar virtue of the Common Law lies not so much in its ancient principles as embodying a theory, as in the fact that its flexibility enables the advance of civilization to mould it into shapes consonant with requirements; so that in many instances parts which at one time were almost fundamental principles have been gradually changed or abandoned as circumstances required. Thus the practical value of the Common Law is that a decision is conceived to be law only until a new and different one is made. But while a decision which represents what is wisest for the present public good may well be proper common law although in conflict with the decisions of two hundred years ago, at the same time the previous decisions are always regarded as the safest guides to what is wisest for the next decision to be; and in the absence of a good reason to reject them, by a sort of mediate inference they have come to be regarded as binding law themselves. And so it is that a vast collection of customs reached without decisions and decisions the outgrowth of customs, added to from time to time by statutory enactments, have come to be regarded as one complex whole stretching from Domesday Book to the present day and called the Common Law.

There have been many assertions of the theory that judges declare, but do not make the law. See 2 Bl. Com., pp. 68, et seq., Hargrove's Co. Lit. 66, and Cooley's note to Blackstone just cited. But while Blackstone's argument that only what is reasonable is law, so that a bad decision is not bad law merely, but is not law at all, serves to explain the valid-

ity of a new decision in overruling an old one, it creates greater difficulties in ascertaining the force of the new decision as standing for itself. Blackstone divides law into written and unwritten law. This sets aside such changes in the law as were accomplished by statutory reform. But the unwritten law necessarily involves conclusions made in court, from accepted principles based on new circumstances; and to say that these are not always law, is to say that they are not binding, which is begging the question, for it assumes merely that any unwisdom in them when pointed out will be readily corrected by another decision, of no more intrinsic authority, but regarded because a subsequent expression of opinion by the respected arbiter.

This unwritten law, then, is potentially judge-made law; and upon reflection it will appear that it is not necessarily limited to corollaries and deductions from old principles. A new decision upon the legal significance of new facts, though representing merely the judge's opinion, thoroughly apart from defective reasoning in deducing a conclusion from this opinion and already established principles, is as much law as the judge's reiteration of the old Saxon principle he applied. But this judge-made law, resting on the judges' own conception of what is right, should not be forever binding merely because it was expressed by the bench instead of the bar. The force of such a system of law must always lie in its wisdom, for the length of time during which it may have been accepted unchanged should only militate to cause a new judge to hesitate to condemn it as unwise. Recent decisions are not infrequently reversed as unwise; and if a court is certain of its position, there would seem no ground to say that it cannot set aside a long line of decisions formerly accepted as law, if they are not in line with the court's idea of right according to the general principles of the so-called "law of the land."

It has not been overlooked that there has been a recent

tendency in the House of Lords to regard its former decisions as absolutely binding and unchangeable. This is very thoroughly traced in Sir Frederick Pollock's "First Book on Jurisprudence" in the Chapter on "Case Law and Precedents." Lord Campbell is chiefly responsible for the doctrine, though it is recognized by his successors. The leading cases seem to be *Bright v. Hutton*, 3 H. L. C. 388; *Atty. Gen. v. Dean and Canons of Windsor*, 8 H. L. C. 391; *Beamish v. Beamish*, 9 H. L. C. 274, and *Houldsworth v. City of Glasgow Bank*, 5 A. C. 317. But see the opinions in *Caledonian Railway Co. v. Walker's Trustees*, 7 A. C. 275, which seem to reduce the view to the idea merely that a reversing decision is to be avoided if possible. It is needless to remind the reader that the Supreme Court of the United States on more than one occasion has deliberately reversed itself, for instance in the "Legal Tender Cases," and lately in the "Income Tax Cases," the last of which reversed the theory of a century's accepted decisions.

But if a court can set aside a previous decision settled along original lines, a fortiori it may overrule decisions based upon a misconception of older legal principles, especially where it appears that the decisions further back were different, and seem wiser for present use than those in the books of today.

Concretely, the modern law in England has now become almost intelligently settled, and has been concurred in by some of our states, that there is no such thing as a covenant or agreement running in all directions as an attachment to land. The utmost that is admitted is that such covenants exist to bind persons who had notice of their nature and creation. On the other hand, it is maintained by some English law-writers, and it is supported by decisions in many of the states in America, that there was such a thing as a covenant running as an attachment to land, and that the early Common Law sustains such a position. It is moreover main-

tained that the existence of such covenants is salutary, that they should be recognized, and that any present law denying their existence should be reversed.

To prove that there were such covenants in the old law, is to prove that the ability to run with land is not a quality in agreements antagonistic to the main principles of the common law; to examine the old law and to find some agreements which seemed to have that quality; and finally, to prove that those creations cannot be classed under other recognized forms of the Common Law. This is the systematic statement of the steps. But to follow this system involves enormous labor. After proving abstractly that the Common Law recognized the systematic shifting of the personal obligation, it would be necessary to look over the whole field of the law for every form of shifting obligation which followed the land, to eliminate the recognized classes, such as easements, for instance, and if there were a residuum, to prove that it was the elementary form of covenants. After this there would be the necessity of tracing these covenants through the formative period of the law, before it would be possible to see how to use them in the law of today.

Of course such a process is undesirable. In order to avoid the examination of unfertile fields of the Common Law, the way to find whether the quality of running with land would be an attribute of covenants antagonistic to Common Law, is to look in the Common Law for some principle in which could be an origin of covenants, to study that principle, and then to prove that running covenants could have an origin in nothing else. After an origin is found, and the nature of that origin is studied, it will then be time to examine more strictly the evidence we have for the existence of running covenants and the complete recognition of them through the formative period of the law.

This mode of procedure has been decided upon in this work, and when it has been thus proved that covenants as



such did run with land at old Common Law, the modern law will be taken up and it will be shown how the modern English judges came to reject them, and to what extent they have been rejected or received in America. It is hoped that in the course of this demonstration the usefulness of covenants will appear; and whatever may be the promise of their recognition in England, that there is excellent opportunity in America to extend their use in new localities and gain for them more complete recognition in older states.

It is apparent that the process of investigation here promised, as well as the logical statement of it, is almost entirely synthetic. While the investigator at first assumes the definition of a covenant, and proves that it is derived from one principle of the Common Law, that is, warranty, and is not contained under other terms of the Common Law, the assumption of the nature of the covenant is only tentative, for he afterward builds up by synthesis the actual principle of covenants, as well as the principles of warranty from which he tries to demonstrate that covenants are derived. So that to tabulate the demonstration in analytic forms, or to follow the a posteriori reasoning so pleasing in such writers as Blackstone, is impossible.

It is appreciated that to the average reader the synthetic method of reasoning is very unattractive; and if everybody knew that warranties had such a history, and that covenants are what it is attempted to prove them, their recognized qualities could be tabulated and the discussion could follow the table. But as it is, all that can be had at the start is a definition of what it shall be attempted to prove is a running covenant, and descriptions of the other admitted terms of law which resemble covenants and from which it is endeavored to distinguish them,—namely, conditions, rights gained by prescription or lapse of time, and easements.

Of course, however, it is not to be forgotten that any definition is entirely artificial. Definitions, so called, of terms

of law are only what certain students think are definitions of those terms; and do not in themselves prove that their subjects may not have more qualities than they ascribe to them. By this it is not desired to raise the question of the logical soundness of all expressed reasoning, but merely to guard the reader not to conclude that certain agreements which he may think are pure covenants, are easements or something else, because included in what someone else classes as easements.

It has been attempted in the first chapter to select from other writers definitions or descriptions of the several terms other than covenants which run with land, which embrace only what everybody admits are embraced by those terms. The definition given of covenants which run with land is merely an epitome of what the writer will attempt to show is a covenant which runs with land.

# A TREATISE ON COVENANTS WHICH RUN WITH LAND OTHER THAN COVENANTS FOR TITLE.

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## CHAPTER I.

### DEFINITIONS.

A covenant which runs with land is a promise by the grantor of land to be active or passive in the use of related land<sup>1</sup> for the benefit of the granted land, or a promise by the grantee of land to be active or passive in its use for the benefit of related land of the grantor, which promise

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<sup>1</sup> It has been suggested that covenants may be made by a grantor of land, to do something on the granted land, for its benefit or by the grantee of land to do something on related land of the grantor for its benefit; and that these cases are not covered by the definition.

Aside from cases of purely personal agreements, which will be explained later in this chapter, the only cases that have presented themselves involving such covenants are cases where ecclesiastics covenanted to furnish singing upon related land other than that which they are supposed to have received as grantees. These covenants might not be personal merely, and perhaps the definition should be made to cover them. But they appear only in the two celebrated Year Book cases, *Pakenham's Case* and *Horne's Case* (see chapter III), and these cases are so confusedly reported that they have not been thought clear enough to warrant the extension of the definition to cover such covenants.

It may be noted that the definition covers incorporeal as well as corporeal hereditaments, if land be regarded as comprehending both. Thus a covenant to pay a ground rent is a covenant by the owner of the related burdened land to be active in its use for the benefit of the granted land—that is, the rent. It will appear later that the running of covenants with incorporeal hereditaments is not universally recognized, however.

must be signed by the promisor in the deed or as a separate instrument under seal at about the same time; and of which promise the effect is to bind the promisor and his lawful successors to the burdened land for the benefit of the promisee and his lawful successors to the benefited land, and to give each the power to enforce his right in his own name.

This definition is not beyond dispute in many points. It has not been attempted to frame a definition which will be generally accepted, as so much of the nature of covenants is unsettled that probably no such definition could be framed which would be of much service in beginning the study of the subject. This definition was framed merely to contain the principles which will be maintained in the succeeding chapters, and any dissent from those principles must be postponed for investigation when those principles themselves are discussed. But by assuming this definition, it is thought much time will be saved the investigator, as it furnishes an opportunity to contrast the principles of these covenants with those of other forms of law, and serves to give a clear idea of what it is to be attempted to demonstrate.

The principles of covenants, as applied by modern courts, are not infrequently clearer than the language of the decisions; and so the principles of covenants must be very carefully distinguished in order to avoid the disastrous confusion of rights, sometimes occasioned by inopportune language found in some decision.

All covenants which run with land have been sometimes erroneously considered to involve merely the principles of covenants for title; and even where the covenants about to be studied have been distinguished from covenants for title, they have been at times confused with conditions attached to estates, with rights gained by prescription, that is to say, easements resting upon a supposed long-lost grant, with rights resting upon "custom" in a particular locality, and with easements created by deeds of the parties.

But the principle of the covenants defined above is so different from the principles of other forms of law that if once thoroughly distinguished, no confusion need arise. These covenants are not the same in principle as covenants for title, although it will be assumed that they both have their origin in the Common Law warranty. Covenants for title in modern law are successors of warranty, designed for that purpose alone (Rawle on Covenants for Title, Chapter I), and have merely to do with fortifying the grantee of land in his title by giving him a hold upon his grantor if the land is taken away. They are "the ultimate assurance given, upon which the plaintiff could rely, a guaranty against disturbance by a superior title." *Andrus v. Saint Louis Smelting Co.*, 130 U. S. 643. The six modern forms of covenants for title, the covenant of the grantor's seisin, the covenant of the grantor's right to convey, the covenant against incumbrances upon the title, the covenant for the grantee's quiet enjoyment of the premises, the covenant that the grantor will give further assurances of title if demanded, and the American covenant that the grantor will warrant and defend the title, have all to do only with the responsibility of the grantor and his personal successors for the complete and honest transfer of title to the land to the grantee according to the contract of sale. The remaining land of the grantor is bound, but it is bound only as all a man's property is broadly bound, as security for his obligations. Their object is the same as the object of the old warranty—the indemnification of the grantee against any chance of loss by defect in title to the property. With the covenants treated in this work, however, the principle is the linking of properties together so as to make one piece more useful by the obligation of the owner of the other. *Norcross v. James*, 140 Mass. 188. And while it will be shown that this is a development of the principles upon which the feudal warranty depended, it in no sense involves the principle of warranty or a covenant obligation for

title. It has nothing to do with security in possession. Hence it appears also that while the grantee of land can never have occasion to make a covenant for title or bind the received land in any way thereby, either party to the instrument of grant can make one of these other covenants and can bind himself and the subsequent owners of his land to do something for the benefit of land of the other party.

It therefore appears that the value of the covenant for title is in the financial responsibility of the grantor; but the value of the other covenants is in the performance of the covenants themselves. In *Fitch v. Johnson*, 104 Illinois 111, the court said, "The acts embraced within the covenant being essential to the use and enjoyment of the purchased estate, it must be assumed their performance was intended by the parties to be coextensive with the estate conveyed. . . . and we are aware of no means by which such intention can be made certainly effectual except by holding, as we do, the covenant runs with the servient estate, and that the assignee thereof is personally liable thereon." And indeed, as will appear later, so far is this performance of the covenant recognized as the important matter in England, that in the British courts the burden of no covenant is recognized as running with the land which cannot be enforced specifically. *Keates v. Lyon*, L. R. 4 Ch. 218.

If, then, the principle of the covenants in question is distinguished from that of those other covenants which run with land usually classed as covenants for title, their principle must be distinguished from that of so-called conditions subsequent in deeds which must be observed by the grantees, and from the principles of the several kinds of real rights and easements, above referred to, which often resemble covenants in their operation.

The underlying principle of all conditions subsequent in grants of land is that they prescribe terms upon which the land shall revert to the grantor. The condition may be that

subsequent to receiving the land the grantee must not do some particular thing, or it may be that he must do some required thing. But in either case, if the grantee fails to perform the condition, his right to the land ceases, and the estate reverts to the grantor as a matter of right; *Rowell v. Jewett*, 71 Me. 408; and he may enter or bring ejectment, as in *Cowell v. Springs Co.*, 100 U. S. 55.

The condition is merely a provision; the covenant is always a chose in action. Hence the formal distinction pointed out through the old law, that "A condition must be the words of the grantor." *Bacon Abr.*, Condition (A). So while a condition may be inserted in an indenture, or deed of grant signed by both the grantor and grantee, it may be just as effective if in a deed-poll, or instrument which the grantee merely accepts without signing. A covenant, however, is essentially a promise signed by the person to be bound thereby, whether grantor or grantee. This distinguishing principle of conditions, utterly different from the idea of a chose in action, avoids all confusion with covenants.

The difference between covenants and all forms of easements may be stated with equal clearness. Remembering that covenants are choses in action, they are always claims upon a person, while all easements are merely claims upon land, and never upon the person who owns the land. In *McMahon v. Williams*, 79 Ala. 288, the court said, "An easement may consist either in suffering something to be done or in abstaining from doing something on the servient tenement. . . . The effect of the deed is to qualify the nature of the estate granted. . . . The grantees took the fee expressly burdened with a servitude."

The easement being therefore a right against land, it follows that the character of rights which can be subjects of easements, is reasonably limited to rights which land can suffer—that is, passive rights. According to the best English authorities, there can be no active easements owed by

land. "An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former."—Goddard on Easements, p. 2, Bennett's ed.

Covenants, on the other hand, being personal obligations, can of course be either active or passive, can obligate the promisor either to do something or not to do something.

The distinction between covenants which run with land, and rights based upon prescription or custom, would seem clear enough; but as in the early development of the law the nature of the rights has been confused, as will appear in succeeding chapters, it is best to get a clear idea now of what "prescription" and "custom" in this connection mean, and their essential distinction from covenants.

Prescription, says Blackstone, II Com. 263, is "when a man can show no other title to what he claims than that he and those under whom he claims have immemorially used to enjoy it." And while prescription later came to be founded upon a written grant presumed to be lost, and has its origin like covenants in the act of the parties, yet the gist of its nature is in its unprovable age; it is a privilege so old that it cannot be disproved; and if it were not old, it would not be prescription. See a full explanation of prescription by Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 85. Therefore prescription is established without writing in fact; while a covenant depends upon a provable promise under seal signed by the promisor. In prescription the act of the parties is presumed; in covenant the act of the parties must be proved.

So rights gained by custom must have the same indefinitely remote origin, as it is called, beyond legal memory; and indeed it has been held that in America a customary right is impossible, as the country was settled within the limit



of legal memory as fixed in England to be the reign of Richard I. *Ackerman v. Shelp*, 3 Halstead (N. J.), 125.

Moreover, a right gained by custom must be applied to a place in general, and not to any particular persons. *Bacon Abr.*, Custom (A); and therefore custom cannot be based even upon a lost written contract between the parties, while a covenant is dependent upon proof of the act of the parties creating it.

But perhaps the readiest means of distinguishing between covenants which run with land and these other rights is to note with emphasis their legal effects. By the definition a covenant which runs with land is a promise "the effect of which is to bind the promisor and his lawful successors to the burdened land for the benefit of the promisee and his lawful successors to the benefited land." According to this the covenant binds the person of the owner of the burdened land, provided he comes by his title legally, and benefits the owner of the benefited land provided he comes by his title legally. That is to say, a covenant affects the person, not the land; and affects only those persons who possess a legal chain of title; so that it excludes disseisors from its effects. Whether they may be held responsible as equitably bound, is not the point now, but merely that they are not technically reached by the covenant in its Common Law effect.

It requires but a glance, then, to see that covenants are radically different in their effect from all other similar forms of law. Prescription and custom operate to confer the right upon the possessor of the land, whoever he may be. And granted easements are rights gained by one piece of land against another piece of land without regard to who is exercising the easements as owner of the land. As to rights gained by prescription, Littleton, §183, says, "Of such things which are regardant or appending to a manor a man may prescribe that he and those whose estate (que estate) he hath were seised of the manor, and of those things as regardant or

appendant to the manor." And Coke adds, "A disseisor shall plead a que estate." While as to custom Coke says (Co. Lit. 113b), "A custom which is local, is alleged in no person, but laid within some manor or other place." And Mr. Justice Holmes, in "The Common Law," p. 382, and Sir Frederick Pollock and Mr. Maitland, in *Hist. Eng. Law*, vol. 1, p. 147, explain that all easements when once established were regarded as property of which the owner was seised, just as he was seised of the land to which they were attached. They were a part of the land.

But from conditions in their effect covenants even more radically differ. With regard to the burdens imposed, the covenant, being personal in its nature, merely holds the person bound by it to perform his obligation; and if he fails, he has committed a breach of obligation which throws his obligee, the beneficiary of the covenant, upon his right to an action at law for his damages. As the covenant confers a right against the person only, the obligee has merely the rights which he would have for the breach of any other sort of personal obligation.

The condition, however, while operating to affect the person, it is true, affects him only secondarily; its direct effect is upon the estate. Littleton, §325, says that estates upon condition are so called "because that the estate of the feoffee is defeasible if the condition be not performed." Thus the condition operates upon the estate only, without regard to who owns it; and if not complied with may take away the estate, if the grantor choose, so as to cut off the tenure entirely.

So also with regard to the benefits conferred the difference in effect between covenants and conditions is great, although in both forms of law the right to the benefit seems purely personal. The benefit of the covenant, as asserted above, can run to any legal holder of the land, whether heir or assign. Whereas the strict benefit of the condition—the

right of re-entry on default by the grantee to comply with the condition, the old law allowed only to the grantor or his heir; he could not assign it. Lit. §347; 4 Kent, Com., 123; *Rice v. Boston & Worcester Ry.*, 12 Allen 141; *Wagoner v. Wabash Ry.*, 185 Illinois 154.

Thus it is that the effect of the burden of the covenant is probably narrower than the effect of the burden of the condition, in that the covenant extends only to successors of the covenantor, while the condition falls upon any holder of the estate. And at the same time the effect of the benefit of the covenant is broader than that of the condition, in that the covenant extends to every successor of the covenantee, while the condition—the right of entry—extends only to the donor or his heirs. This distinguishing peculiarity seems to have no historical significance, but shows the total unlikeness of the two forms of law.

So much for the abstract distinctions in nature and effect to be found between covenants and other forms of law.<sup>1</sup> But

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<sup>1</sup> It has been suggested that there may be a difference between covenants in deeds which are expected to be enforced specifically and stipulations in deeds the noncompliance with which merely affords damages. At a moment's thought it will appear that the distinction is merely illusory, arising from a confusion of the field of running covenants with the field of simple contracts. In simple contracts some provisions go to the essence of the whole contract, and a nonperformance of them renders the defaulting party devoid of any rights under the contract; while other stipulations are construed to be collateral, so that the failing party may have rights under the contract not forfeited, but yet be liable to an action for damages on account of breach of the stipulation. But a covenant which runs with land is never entered into with the idea that its breach will defeat the conveyance. The parties never expected anything but an action for damages on its breach. True enough it may be enforced in equity sometimes, but that is only in cases where the breach consists in an attempt to do something which it was covenanted not to do, and a court of equity would restrain by an injunction. But equity would enforce every covenant, and for that matter, every stipulation in simple contracts, the same way, if it had any machinery with which to do so.

Thus there is nothing in the idea of such a distinction.

the difference in the concrete between covenants and other forms of law is equally as apparent. It is affirmed in the definition that covenants confer active or passive obligations concerning the use of the land. That would embrace such agreement as that by a grantor that all his tenants should grind their corn at a mill on the granted premises; an agreement by a prior that he would furnish singing in a chapel on the premises;<sup>1</sup> an agreement by the grantor of certain property that the contiguous property should not be used for trade. These are certainly legitimate covenants, and as they are not privileges which one piece of land can suffer and another piece of land exercise, they must be the exclusive subject of covenants, unless they can be enforced as customs. But there seems little more reason in saying that custom can compel a person to sing or to take his corn to a particular mill, or not to build a shop on his land, than to say that he can grant the obligation to sing as an easement, or to say that the obligee is seised of the right that a shop shall not be put upon the adjoining land. But strange to say, it is maintained that such rights were obtained by custom, and that they are in the nature of active easements; and this matter will require full discussion in a later chapter. Of course they could be conditions, so that the obligor would be obliged to perform them or give up his property; but the means of enforcing them if conditions would not be by action for damages, but by re-entry and an ousting of the defaulting obligor from the possession or by an action to recover the land itself.

If, then, there has been shown a sufficient distinction between a covenant which runs with land and other similar forms of law, it is now time to explain the definition of these covenants in detail, so as to understand the individual qualities therein asserted to belong to a running covenant.

First, it is "a promise . . . in a deed or a separate

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<sup>1</sup> See ante, page 1, note.

instrument under seal." In this it is like every Common Law specialty. The seal, except where dispensed with by statute, constitutes its formal importance as a written instrument; so that the writing itself, not the promise which it contains, is the obligee's property. It must be delivered and accepted like every specialty; and it must fill all requirements of specialties. There is no necessity to give authorities as to what specialties must be; any Common Law authority is clear enough on them.

The apparent distinction between covenants and ordinary specialties which lies in the fact that the assignee of land affected by covenants sues or is sued in his own name, while the assignee of a specialty commonly sues in the name of the assignor, is only an apparent distinction. The old law, as we shall see, gave rights to successors only where they were mentioned in the covenant by the terms "heirs and assigns;" and it would seem that as an outgrowth of warranty, this must enable these parties to sue in their own names, just as they probably did in express warranty, where in turn they derived the custom from implied warranty; and in implied warranty, as will be seen in the next chapter, it was clearly proper for each landholder to sue in his own name.

Secondly, the covenant is to be "active or passive in the use of the land." The common phrase is that it must "touch or concern" the land. No covenant will run which is personal merely, and can be performed without the obligor owning the land, or which can benefit one not owning the particular land to be benefited. Thus if A sells a piece of his land to B and covenants to cut B's hay for him yearly, this covenant will not bind A's vendee of the remainder of the land; for anybody can cut B's hay without regard to his proximity to B. And the same would be the case if B, in consideration of A's selling him a piece of his land, should covenant to cut A's hay. These are merely personal covenants, and would not run beyond the agreeing parties. But

otherwise if A in selling part of his land to B, covenanted that he and his successors would take their corn to a mill on the granted land to be ground; for none but B or his successors could take this corn to the mill, and A or his successors would be the only direct beneficiaries.

Thirdly, the covenant must be "in a deed granting the land, or made about the time of the grant." This requirement is chiefly historical. It followed the requirement of the old warranty, from which it will be maintained later than covenants derive their origin. But the requirement has been followed generally because it is salutary. It prevents a too frequent exercise of the right to bind land, and restricts it to those cases only where the covenant figures in the general value of the land in a sale. The reason why it is sufficient that the covenant be executed about the same time as the grant, is that it may be then presumed that it was a part of the whole transaction. A similar requirement, though not so well established, is that the grant should be a part of land the remainder of which is retained by the grantor. That is, that the land burdened and the land benefited should be contiguous or nearly so. It is believed that this requirement does obtain. Certainly it is the usual condition of things; and the principle of this requirement was a principle of warranty, as of course in subinfeudation the grantor had an interest in the granted premises. But how thoroughgoing this requirement is in covenants the reader will be left to discover when he comes to the old cases. At least the two pieces of land must be related, however, and it seems that both pieces must be the property of the grantor at the time of the grant which accompanies the covenants.<sup>1</sup>

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<sup>1</sup> Numerous interesting cases suggest themselves, some of which would seem to warrant the running of accompanying covenants, but upon which the author can now recall no satisfactory cases at Common Law indorsing the running. For instance, A and B might each own a piece of property, the two being contiguous, and for some reason they might effect an exchange. Why could not cove-

Fourthly, the effect of covenants, as set forth in the definition, has been made quite clear already. The definition means that it shall bind by its burden the owner of the land burdened and his heirs and assigns, and no others—those in privity of estate with him, as it is technically called. It does not bind those who get the estate by forcible ousting of the owner. And what is said of the burdened land is true also of the benefited land *ad infinitum*. But to the idea that the heirs and assigns have no rights unless mentioned, there is some qualification in modern law. The old law required that heirs and assigns be included in the original covenant if they were to be burdened or benefited by the covenant, because the old law required explicitness in everything. But whether this old requirement must be observed to-day may well be doubted.

With these main points explained the reader is prepared to begin the study of covenants. It only remains to give instances of the common covenants occurring to-day, and then to pass to the examination of the rise and history of covenants from their assumed source.

The early covenants were solely for the individual uses of the contracting parties, that the grantor might retain some hold upon the usefulness to him of the granted land, or that the grantee might be given some special inducement to buy the land. They were covenants to pay granted ground rents, covenants not to allow other mills to be built which would interfere with the business of those sold, covenants to furnish  
 nants made in the exchange run with these pieces? Again, not infrequently A owns related properties, X and Y; and sells X to B, who makes certain covenants with regard to Y. Later A sells Y to C, who makes similar covenants with regard to X. Now C can enforce B's covenant; but outside of equity can B enforce C's covenant? There would seem to be lacking privity of estate—i. e., succession in title—between them. As to this last stated case, reference may be made to enforcement of covenants in equity, Chap. XI, and as to the general subject of the position of strangers to the covenant, see Chap. IX, sec. 2.

a certain share in the repairs of a dam, covenants to allow a millpond to be drawn off to obtain alluvial deposit, and all the various agreements which render adjoining properties of mutual service in the carrying out of some particular purpose. These covenants practically tied the two properties together, and as the use of large tracts of property might be hampered in future by these agreements, they were thought to be dangerous, and hence fell under general condemnation. But as later civilization began to make it of great importance that large tracts should be retained in some special use, the former disadvantage of tying them together by covenants came to be an advantage instead. Thus to-day the commonest instances of covenants are found in their use in conforming the fractions of large tracts to interdependent usefulness.

The chief cases are:

1. Covenants as to the maintenance of fences and walls;
2. Covenants as to the building and use of party-walls;
3. Covenants as to the leaving open of ways or parks;
4. Covenants restricting building to a particular line and
5. Covenants restricting the kinds of buildings in a locality.

But of course many occasions present themselves still in the various applications of these main divisions which require the terms of the covenants to be both to do and not to do particular things; and indeed there are still many covenants which cannot be brought under these classes, though too unlike to make a class themselves.

It is well to state here that these classes refer only to covenants in grants of complete fees. In leases for life or for years, the grantor retains a very close interest in the very property leased; so there are all sorts of covenants which he



finds it to his interest to insert in the writing. The usefulness of these covenants has never ceased to be recognized, and their ability to run both with the lease and with the reversion has never been denied in any country or state where the Common Law is in vogue. Moreover, in the thirty-second year of the reign of King Henry VIII of England, Parliament enacted a statute, recorded as 32 H. VIII, ch. 34, which declared that such covenants in leases should run.

The main purpose of this statute was to declare the binding effect of all contracts of lease destroyed by the statutes of mortmain, which caused forfeiture to the crown of the estates of the Roman Church. Many of these estates were leased to individuals, and the crown wanted to hold the contracts of the lessees intact. But why this statute was drawn to cover all leases, is difficult to say. The fact that it was so broadly drawn, however, has furnished a ground for saying that the burdens of covenants not in leases do not run; and in all recent decisions the English and some American courts have assigned that statute as proof.

To return, then, to the classes of covenants in grants of fees, it will be noticed that the last two of these classes are all in substance covenants not to do particular things; that is to say, they are restrictive covenants. So some of the modern English judges, recognizing that they are passive covenants, and in this quality resemble true easements, although in fact they do not confer rights which are incorporeal hereditaments, held that they were a species of easement. And so, while they denied that a covenant could run with land so as to bind successors to the land, they held that where successors knew of such a covenant as to the use of the land, they were morally bound to regard it, and in a court of equity could be held to do so. Hence developed the so-called equitable easement; which must always be a restrictive agreement.

The third class, too, while conferring a right very like an

easement, is treated sometimes as a mere restrictive covenant.

But the first and second classes of covenants above given, are not restrictive, and have never had any systematic explanation. It has been said that the right to exact of a neighbor to build a fence is a spurious easement also, and that the agreements as to party-walls can be distributed under equitable charges upon land and trusts. But how far this is satisfactory the reader must decide for himself when he examines them in subsequent chapters. At present the reader is probably anxious to investigate the origin of covenants, and the reason for maintaining that they run with land in the way described in the definition.

In accordance with the introduction, some origin for covenants in the principles of the Common Law must be assumed and then proven; and as already indicated, it seems best to look for the source of covenants in the Common Law warranty. Warranty was one of the features of all feudal tenure. When the feudal lord enfeoffed a tenant of land, the old custom implied that he warranted the possession of that much land to the tenant; and agreed that if the tenant served him or paid him his rent, he would keep the tenant in possession; or if the tenant was driven out by some one who had a better right to the land, he would give the tenant other land of the same value. This warranty was merely an implied contract. But in later days, when the forms of feudal obligation were altered by statute or custom, as we shall see in the next chapter, it became common to express this contract in writing under seal, and this writing was called an express warranty. Thus it was a written agreement concerning the granted land, and would seem a very likely origin for all covenants which run with land.

Let us now examine the principles of this warranty to see whether its qualities are not in accord with those attributed to running covenants.

## CHAPTER II.

### THE PRINCIPLES OF COMMON LAW WARRANTY WHICH CONTROL RUNNING COVENANTS.

The origin of covenants being therefore assumed to be in warranties, the next step is to pay a limited attention to the law of warranty in order to have a conception of the operation of its derivative. As no reference can be made to any limited account of warranties adapted to the purpose it has seemed unavoidable to make an abstract of their salient principles here.<sup>1</sup> Covenants could only have sprung from express warranties; but as express warranties represent merely the crystallization of implied warranties, the implied warranty must be regarded as the basis of their law. Coke called warranty a covenant real because it was concerned with the land and was available only to one who had been disturbed in his possession of the land warrantied. Y. B. 43 E. III, 186; Y. B. 21 H. VI, 41; Y. B. 22 H. VII, 22; Brooke, Voucher 71; Viner, Voucher 54. It would seem, however, that the relation of warrantor and warrantee was originally merely a contract of which the guaranty of the possession of a certain amount of land was a later incident. 2 Pol. & Mait. Hist. Eng. Law, 287. The chief idea was the protection furnished the tenant in return for the duties imposed upon him. The Lord was his defender in any difficulty

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<sup>1</sup> A very good description of the origin and development of warranty may be found in "Lectures on the Constitution and Laws of England," by Francis Stoughton Sullivan, of the University of Dublin (in the last century), Lecture 12. It is merely descriptive, however, and does not explain how warranties came to have the effects which it asserts that they produce. For the citation the author is indebted to Mr. James DeWitt Andrews.

that might arise. In certain instances a landholder would surrender his land to a powerful Lord only to carry out the fiction of tenure by receiving it again.<sup>1</sup>

This personal character of warranty survived the whole feudal period, even after the notion was common that warranty was a mere incident of tenure; for at no time could a disseisor of the tenant avail himself of the warranty. Bracton f. 380 b; H. C. L. 386. But in time, as estates became settled, and the giving and taking of land was no longer a fiction, the chief value of the warranty became the tenant's assurance of a hold upon the land granted him, and his claim upon other land of the grantor if he should be ousted from his possession.<sup>2</sup> This personal contract grew to have the effect of binding the land out of which the parcel was granted, or if necessary, other lands of the grantor. How this originated can only be surmised, but that it was the law in Bracton's day is very clearly laid down. He says land may be bound expressly, or by implication where the grantor has other lands of value at the time. Bracton f. 382. And to this end he cites a case where the assignee of the assets of the warrantor was held to be bound to make good the warranty, f. 387 b; and he thinks it should bind the Lord holding the assets by escheat, f. 393 b.

That it first bound the land out of which the parcel was granted may be especially significant. He says that where the heir has not enough of that land he should make it up from other lands descended from the ancestor who warranted, f. 387 b.

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<sup>1</sup> See Maitland, *Domesday Book and Beyond*, pp. 71, 74.

<sup>2</sup> "Note I to Co. Lit. 384b contains a full discussion of the operation of the word 'grant' to imply a warranty. The legal import of this term appears, in conveyances in fee simple, to have changed with the alteration made in the relative situations of grantor and grantee by the statute of *Quia Emptores*; but it may be observed, as to its etymon, that it is merely a contraction of the verb 'guarantir' 'to warrant.'" Vin. Abr. Sup. tit. Grant, p. 15.

Every grant of a freehold implied this warranty; and except as altered by statute, its benefits continued in England down to the abolition of all real actions in 1834, 3 and 4 Wm. IV; Lit. sec. 143. But its occasion was limited. The Statute of Gloucester confined the word "grant" to implying a warranty for the life of the grantor only; and the Statute of Quia Emptores, 18 E. I (A. D. 1290), dispensed with implied warranty almost entirely, for by making the feoffee hold of the original lord instead of the immediate assignor, no implication of warranty could be made for an estate in fee. This was the occasion, then, for the hitherto rather uncommon express warranty to become universal, and for allowing the old implied warranty to survive only in homage ancestral. It survived in holdings by homage ancestral, for in those there had been no assignments, the rights of both tenants and lord descending continuously to their heirs without interruption by any alienation.

Blackstone says, though without quoting authority, that express warranties had originated as a method of accomplishing the alienation of the fee, which had been impossible without the consent of the heir, II Bl. Com. 301; and later authorities believe this statement correct. Certain it is that in the early law the heir had a right in the land during the lifetime of the ancestor, II Pol. & Mait. 246. So it was customary to state in a deed that the heir consented to the alienation, *id.* 249. And though by Henry II's time the judges decided that alienation *inter vivos* was possible without consent of heirs, II Pol. & Mait. 247, and this became established by 1188, II Pol. & Mait. 310, in the meanwhile the desire to alienate had discovered the express warranty which bound the heir and made his consent unnecessary. II Pol. & Mait. 310, 311. This became the established use about the year 1200; and from this probably arose the use of warranty as a rebutter against the heir's claim to the inheritance.

But how it was that the heir was bound by the warranty is a more difficult point. Bracton's later law that the land was bound was necessarily a derivation, else the law would have been reasoning in a circle. It has been maintained that it arose from the medieval idea of succession, based upon the conception of identity of ancestor and heir. The historical support for such an explanation is very strong, Holmes, *Com. Law* 346-7; and as the law was already becoming merely a collection of effects resulting from the survival of different tendencies whose causes had disappeared, such an explanation may be correct. But if true, this notion of identity between ancestor and heir was advancing in warranty at the same time that the notion of identity was decreasing in the ownership and rights in the land. The ancestor was binding the heir by a new obligation on the ground of their being the same person, utilizing it as a device to strip the heir of a right in property which the heir was claiming as a different person,—through the law hitherto dominant that the possession and rights of heirs should be protected. From Bracton's day on we saw that the heir was bound to warrant only to the extent of assets received; but from Glanvill it appears that assets were not always necessary, *Glanv. VII, c. 2* (Beames' ed. 150), *ib. c. 8* (Beames' ed. 168), though later writers have explained that conflict by the rather unlikely suggestion that the possibility of receiving assets was enough, *Co. Lit. 373a, II Bl. Com. 301*; and while this indicates identity as well as anything else, yet concurrent with this law was the necessity to name the heir or assign to bind him. Besides, it appears that duties and rights were allowed to arise by the mere mention in places where identity would hardly explain. Such is the obligation to pay X or his attorney.

So it is suggested that these obligations of the heir were somehow dependent upon the mere mention of him, the contract that the ancestor put upon him. "As to the hereditary

transmission of a liability, this we take it was not easily conceived, and when an Anglo-Saxon testator directs that his debts be paid, this, so far from proving that debts can normally be demanded from those who succeed to the debtor's fortune, may hint that law is lagging behind morality."—II Pol. & Mait. 256.<sup>1</sup>

It also suggests itself that an express mentioning of the heir was allowed to bind him in express warranty, because he had always been bound by the implied warranty, it being overlooked that the implied warranty which bound the heir was really not the ancestor's warranty, but the heir's own new warranty arising on his receiving the tenant's homage.

But whatever be the origin of its effect the early express warranty soon came into very general use as a rebutter as well as a guaranty; and while it worked fairly enough so long as the ancestor had a fee in the land alienated, and merely deprived the heir of lands which would have descended from the warrantor, it was soon used to very harsh effect as a sword against the heir by "rebutting" or barring any and all claims the heir might make to the warranted land, though the descent would not have been from the warrantor. A father, tenant by courtesy, began to alienate in fee with warranty, and so by letting the warranty fall upon the heir would cut him out of his inheritance. This had to be remedied by statute; and in 6 Edward I the Statute of Gloucester provided that these alienations should be void against the heir except to the extent of the value of assets received by descent from the father. The purpose of this

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<sup>1</sup> It is unnecessary to cite cases to show the unwillingness of the law in a somewhat later period to hold heirs and successors to the strictest moral obligations where there was no expressed indication of an assumption of the obligation on their part. Such is the law of uses well through the year books, so that heirs of a trustee were not bound to the trust, and a wife got dower in the lands held to uses. For a collection of these cases see Mr. J. B. Ames' *Cases on Trusts*, 2nd Ed., pp. 345, 374.

statute seems sometimes to have been misunderstood, for it is quite droll to read Mr. Butler's note to Co. Lit. 365a, explaining how the rebutter is merely of no effect in alienations of fees-simple to which the ancestor had right.

But this statute did not remedy all the evils, for holders of conditional fees, which would have been assets by descent, in alienating the fees would use a warranty to cut off the heir from reclaiming them; and so upon the enactment of that celebrated statute *De Donis Conditionalibus* which created estates-tail, 13 E. I, the courts construed it in analogy to the Statute of Gloucester, and decided that the alienation with warranty of an estate-tail would not bind the heir except to the value of other assets received by descent. It is evident from these restrictions that the law of Bracton, f. 61a, that a warranty can never bind the heir beyond the assets received by descent, had not become unquestionably fixed at the time of enacting these statutes.

But the requirement of assets to produce the rebutter in these instances gave the confused impression later that in other instances the old law still survived that a warranty would be operative to bar the heir though he got nothing by descent. Glanvill, writing before these statutes, said that assets were not necessary. Then came the statutes. Then Bracton's statement shows that the law had developed with the steadily advancing ideas of justice to relieving the heir entirely when without assets descended from the warrantor. The whole fiction of collateral and lineal warranties as rebutters, it is submitted, was allowed to survive from a failure to notice when these statutes had been enacted; for Littleton says, sec. 711, "And note, that as to him that demandeth fee simple by any of his ancestors he shall be bound by warranty lineal which descendeth upon him unless he be restrained by some statute." And so it was held that while on account of the Statute of Gloucester a father tenant by courtesy could not rebut his son by his warranty in alienating the land in



fee, the land descending to the son from the mother, yet a father life-tenant might bar a son who happened to be a remainder man (though in that case also there was no descent to the son from the father), because the statute did not name that case. This was elaborately set forth by Chief Justice Vaughn in *Bale v. Horton*, Vaughn 360, citing Holt in 12 Mod. 512. Compare, however, an apparently contrary decision in *Y. B. Mich. E. III*, 50.

It is unnecessary here to go into the elaborate refinements which arose in connection with lineal and collateral warranties. For us it is of no use whatever, and for the student of law history no writer will ever be able to supplant Littleton on that subject. Writing, as he did, at a time when their use was at its height, he has probably told all about them that it was ever of use to know. Moreover their origin has been simply and carefully told in the first chapter of Rawle on Covenants for Title; and it could be but rewriting his story of them to discuss them here.

Meanwhile Bracton's notion that the warranty bound the land found occasion for development, and the theory of identity of ancestor and heir received a blow. In *Y. B. 20 E. I*, 232, the court had said 'that the heir is the person of his ancestor and so covered by a warranty.' But warranty being a Common Law relation, the courts could not conceive that it could cover more than one heir, and that the heir by the Common Law. So a trouble arose when the warranty came to be used in connection with gavelkind lands and borough-english in its operation as a rebutter. Littleton, sec. 718, says that in gavelkind only the heir at Common Law has the warranty descend upon him; and in sec. 736 it is pointed out that the eldest son only is bound; and Coke, 386a, realizing the mere personal relation, points out that it is the difference between a lien real and a lien personal. See also *Co. Lit.* 376a; and Brooke, Ass. 22, saying that it bars the oldest only, and citing 44 E. III, 16. And note *Y. B. 22 E.*

IV, 10, that a younger son cannot be vouched [called into court to warrant] even though he had assets by descent. Singularly enough the case seems never to have arisen where the effect of the rebutter had to be decided in connection with the rights of female co-heirs by the Common Law. Perhaps such a decision would have clearly explained whether the operation of warranty was a personal succession or the mere wish of an ancestor.

But however the judges decided the operation of the rebutter in gavelkind, when the actual warranting by giving more land for the land warranted came up, they could not stand the injustice of the eldest son bearing the whole burden while the others took their estates free. So in *Y. B. 11 E. III, 181*, the court said obiter that all having assets might be called to warrant; and they finally settled upon the rule that the eldest must be summoned on strength of the warranty, but all on their possession. *Viner Voucher 36*; *Y. B. 38 E. III, 22*; *Dyer 343b, 55*; *Hobart. 31 pl. 13*; *Cro, Jac. 218, 6*.

It must not be conceived, however, that warranty had developed into a lien real. For while its effect had become limited to binding assets received by descent, *Y. B. 7 E. II, 236*, *Y. B. 13 E. III, 50*, *Brooke Gar. 23*, and that while they were in the hands of the prosecuted party, *Y. B. 1 E. III, 2*, *F. N. B. 134 I*, citing *8 E. II Vouch. 237*, the successor could be held only when he had been expressly named. *Brac. f. 380b, 6*; *F. N. B. 134 H.*; *Cf. Fleta, Bk. 2, ch. 62, sec. 10*.

The rule may be deduced, then, that warranty bound lands in the hands of the successor when the express contract indicated that it should. That is to say, it ran with lands to successors in the estate of the warrantor, and ran only as the warrantor intended.

We come now to inquire who might have the benefit of the warranty; and incidentally how it was enforced. Speaking broadly its benefits ran to the grantee and the lawful successors to his title in the estate. It was enforced in one of two

ways; and as the Common Law was economical, these ways were not concurrent. See F. N. B. 134, I; Com. Dig. Vouch. A1; 3 Bl. Com. 300. If the title of the tenant were in question under a writ of entry, or other real action, his remedy on the warranty was by voucher. He called or vouched his grantor to warranty, and when the warrantor appeared, he took the place of the tenant in defending the action. And if judgment were given for the demandant in the action, the tenant got judgment over against the warrantor for an equal amount of land. Bract. f. 380b.

If, however, the action against the tenant were an assize to prove the right to the land, he could summon his warrantor by writ of warrantia chartae, as it was called; and if the tenant lost in that action, the same judgment gave him judgment over against his warrantor for damages. Now this right to the tenant existed by implication wherever there was tenure or homage, in the absence of stipulation to the contrary. Bract. f. 37, secs. 10, 11. It existed before the Statute of Quia Emptores in all cases. Glanvill Bk. 9, ch. 15. But as that statute destroyed subinfeudation, and an assignment brought no homage to the assignor, it destroyed implied warranty by the assignor. So after that period implied warranty of a fee existed, as we have seen above, only to tenants who were descendants of original tenants, and who held of descendants of original lords. This was tenure by homage ancestral, and was of course not affected by the statute. But it existed to tenants in tail or for life; for such holdings always are carved out of a reversion, and so are not affected by the statute of Quia Emptores. Y. B. 18 E. III, 8; Y. B. 40 E. III, 14; F. N. B. 134G; Lit., sec. 738; Co. Lit. 384b, 387a. An implied warranty could not extend to a lessee for years either before or after the Statute of Quia Emptores, for a tenant for years held not his own possession, but his lessor's; Co. Lit. 389a, 384a, and Butler's note; and therefore there was no tenure. This was hardly an accurate conclusion if

the relation between landlord and tenant was merely personal, but warranty had come to be considered an incident of tenure. Cf. Holmes' *Com. Law*, p. 371 et seq.

Express warranty, however, had a very much broader operation. The Statute of *Quia Emptores* did not cut off express warranties. In fact, we have seen that it enlarged them; for contract could vary the Common Law, *Bract. f. 37*, and express warranty could go wherever it was willed. It always had to be in writing, however, *Lit. sec. 703*, *Co. Lit. 386a*, *Shep. Touch.*, 186; and the writing was strictly followed. *Y. B. 20 E. I.*, 232.<sup>1</sup> But the method of calling to warranty the first warrantor at once was not the earliest custom. It seems that the attacked tenant called his own grantor, and he in turn his grantor, until the grantor finally responsible was reached.

Only in case of the death of the immediate grantor without heirs could an assignee vouch his assignor's assignor. From the connection in which Bracton lays this down Mr. Justice Holmes thinks it clear that Bracton based it on the theory that an assign was a quasi heir, and that the obligation fell on him from his identity with the assignor. *H. C. L. 374*; *Bract. f. 17b*. But be that as it may, in time the assignee or his heirs was able to vouch to warranty the original warrantor, and so the law of express warranty reached its climax. The right never extended to any but those mentioned. *Bract. f. 389b*, secs. 7, 8, 11; but when so indicated it could extend to assigns. *Bract. f. 380b*, sec. 6, and *f. 381*; *Co. Lit. 384-5*; *Shep. Touch.*, 198.

But the personal nature of the contract of warranty still survived. The right to enforce the warranty was not one

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<sup>1</sup> Bracton gives this form of express warranty: "I and my heirs warrant to him and his heirs so much; or to him, his heirs and assigns and the heirs of his assigns, or assigns of his assigns and their heirs. And we will acquit and defend them in all that land and its appurtenances against everybody." Cf. *Rawle, Covts. for Title*, p. 5, n.; *Co. Lit. 383b*.

which any one could secure merely by having possession of the land warranted. The tenant must be in of the same estate as the original warrantee. He must be his heir or his legitimate assignee to have the benefit of the contract. Y. B. 43 E. III, 186; Y. B. 21 H. VI, 41; Y. B. 22 H. VI, 22. And a disseisor could never enforce the warranty enforceable by his disseisee. Y. B. 20 E. I, 232; Bract. f. 53a; H. C. L., 387.

It is evident then, that the rule deduced for the running of the benefit of express warranties is the same as that for the running of their burden. It ran to those successors in estate of the original warrantee to whom the original parties indicated an intention that it should run.

Such are the principal features of the law of warranty throughout the formative period of our present law. What has become of it is of little importance in our present inquiry. It existed under certain changes down to the abolition of all real actions in 1834, Statute 3 & 4 Wm. IV; but had fallen into comparative disuse since the development of covenants for title.

After the Statute De Bigamis allowed damages for breach of warranty it was but a matter of time before damages would become universal. As warranties were in some cases sued on as covenants (see *supra*), in time covenants instead of warranties appeared in deeds. Mr. Rawle tells us that covenants for title gained universal use after the Statute of Uses, 27 H. VIII, Ch. 29. As that statute dispensed with real conveyances, he thinks the old method of giving a real warranty of title gave way as no longer fitting to the newer form of conveyance generally in writing. But as the written warranty had been for so many years in full sway, there would seem nothing incongruous in the continuance of their use in deeds of bargain and sale. While on the other hand, words of covenant instead of words of warranty would be the direct outcome of the right of remuneration in damages for failure of title. It is not a surprise therefore to see Mr. Rawle him-

self say that these covenants were frequently used before King Henry's twenty-seventh year; so that their use was perhaps only enlarged as a consequence of the Statute of Uses.

But to learn much or little of these far-reaching covenants it is indispensable to refer at once to Rawle on Covenants for Title. Suffice it to say for the purpose in hand that those covenants are confined to successors in of the same title—to those who enjoy privity of estate; and that the liability rests upon the covenantor or his bound representatives who hold assets by descent. As the remuneration is a matter of damages, assigns of the bulk of the land from which the parcel is granted have never been regarded as bound to assist; the law has slipped away from them.

## CHAPTER III.

### ORIGIN OF COVENANTS WHICH RUN WITH LAND.

As it has seemed most satisfactory to derive these covenants from the early express warranties in deeds, it is at once necessary to explain the grounds for such a conclusion as well as to suggest reasons why other theories seem less to be recommended.

It is probable that written warranties were among the earliest written contracts,<sup>1</sup> although they may have been enforced differently from other written contracts when they related to a freehold, as the damages for breach of warranty were first given in the form of other lands. But it is not difficult to prove that the contractual relation was always so prominent in warranties that they were commonly regarded as covenants.

As we have seen, the express warranty followed the implied warranty in time and the implied warranty applied only to freeholds, so until statutes made recovery on all warranties possible in damages instead of in land, it is not surprising that their enforcement was limited to voucher.<sup>2</sup> But terms for years, being chattels and not involving tenure, were regarded as incapable of implying warranty, so where warranties were inserted in early leases for years, it would be but natural to see them considered as simple covenants, as there was nothing else to consider them. That this difference between freeholds and terms for years was rudimental is evident from its duration in the minds of lawyers long after damages could be recovered on any warranty. In Y. B. 26

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<sup>1</sup> II Pollock & Maitland Hist. of Eng. Law, p. 222.

<sup>2</sup> For explanation of voucher see ante pp. 40, 41.

H. VIII, 3, Brown J. said, "There is a diversity between covenant real as a warranty of the fee or frank tenement, and warranty of a chattel, for if I enfeof you with warranty you have no longer advantage of that covenant if you are not tenant of the land. But if I lease land for a term of years with warranty, the lessee has a brief of covenant against one notwithstanding that he is ousted of his term—which was granted by the whole court."

Very early, then, we see covenant brought on warranties in leases. Bracton's Note Book, p. 204; and Fitzherbert says, Abr. Cov. 21, "In time of Ed. I, note that it was agreed clearly by all the justices and sergeants that if a man lease land for a term of years and die during the term, if the lord oust the termor, the tenant shall have action of covenant against the heir at full age during his tenancy." And see Fitz. Abr. Cov. 29, time Ed. I; also ib. 27; also ib. 26, Mich. 34 E. 1; also ib. 24, Hil. 19 E. III.

A singular conclusion to the contrary was reached in Y. B. 30 E. I, 142, although the identity of covenant and warranty was impressed all the more deeply upon the court. Covenant on a warranty was brought by an assignee against an assignor of a term for years, and the court held the writ would not lie; because warranty would not lie where there had been no seisin and there could not be warranty of a term for years. Then this writ sought damages, 'which meant a tort, and there had been no tort.' But the Statutes of Merton, 20 H. III, 1 (A. D. 1235), Marlbridge, 52 H. III, 16 (A. D. 1267), and Gloucester, 6 E. I, 1 (A. D. 1278), had in the meantime given the alternative of damages instead of other land in cases of warranty, so but for other methods of procedure there would be opportunity to bring covenant every time.

Covenant was allowed without comment in Y. B. 31 E. I, 196; and any subsequent infrequency of its appearance may be attributed to the universal economy of the Common Law,



possessing already the exclusive methods of enforcing warranty by means of the old voucher and the *warrantia chartae*, which were described in the previous chapter.

Leases are enough, however, to prove the important point in this connection, that covenant was allowed on warranties beyond the original parties. Assignees brought covenant on these warranties in Note Book pl. 804, 2 Pol. & Mait., p. 222, Fitz. Abr. Cov. 27, time E. I; and thus was accomplished the first step in conforming the running of covenants to the running of warranties. Covenants should run because they were used as warranties, and express warranties ran because implied warranties ran.

Having reached the point, then, where the form of an action on a running right might be "covenant," the step was very easy to confuse its substance, and to allow other rights conferred by covenant to run like the one running right which was being enforced by an action of covenant; and so we look for other covenants affecting the land to run about the same time. It would not surprise us in the light of previous discussion if they should have been only covenants in leases; but either because the lawyers did not at first see that covenant should not be brought on a fee warranty, or because the whole idea of contract and warranty was one in their minds, they allowed covenants other than warranties to run with freehold estates in land. 4 H. III, 51, given in F. N. B. 145; Y. B. 21 E. I, 136; Y. B. 4 E. III, 57.

It would seem clear enough, then, so far, how covenants run with the land like warranties; but it is here that a different theory presents the argument that they diverge. It suggests that covenants which run with the land are in the nature of easements or rights issuing out of the land and have nothing to do with warranties whatever.<sup>1</sup> The material effect of such a theory is not different so far as the practical working

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<sup>1</sup> For the elaboration of the theory that covenants are the result of services see Holmes, *The Common Law*, p. 390 et seq.

to-day is concerned. It would serve only to dispense with any necessity of privity of estate and allow any holder of the land to which the covenant is supposed to be attached to enforce or be bound by the covenants. For a theoretical understanding of the law, however, the question is, of course, rudimental.

So far as covenants for warranty run with land it is thus maintained by the supporters of the easement theory that they have developed into the covenant for title alone,—and indeed this origin of covenants for title seems beyond question; Coke refers to warranty as a covenant real, *Co. Lit.* 365a,—while they say that other covenants affecting land are not personal covenants at all, but are of the nature of rights in the land like easements.

But the advocates of that theory do not contend that these covenants originated in easements proper. Such a position would be untenable. The easement from the earliest day, while originating perhaps in a contract, had nothing to do with imposing a personal relation. It was a grotesque conception of an existing hereditament, a possession of an imaginary realty abstracted from land. 2 *Pol. & Mait.* 147, *H. C. L.* 384. And as the obligation was by the land and not by the person, the necessary conclusion was that this obligation by the land could be only passive.<sup>1</sup> *Goddard on Easements*, p.

<sup>1</sup> "Easement is a privilege that one neighbor hath of another, by writing or prescription, without profit; as a way or sink through his land or such like. *Kitch. f. 105.*" *Termes de la Ley*, *Rastell's* edition, p. 319.

"An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." *Goddard on Easements*, p. 2. *Bennett's* ed.

*Washburn on Easements*, p. 38, says "it may be created by a covenant of the owner of one estate with the owner of another estate, that he should have a right to enjoy certain

17, points out that an easement is imposed upon the land, not upon the person of the servient owner; "therefore an obligation imposed upon him to do something for the benefit of the dominant tenant is not an easement; or in other words, there can be no easement rendering it compulsory for the servient owner to do something." So in *Pomfret v. Ricroft*, 1 Wm. Saund. 322a, it was laid down that the grantor of a right of way is not bound to repair the way, but the grantee can enter and repair.

But while covenants may have nothing to do with proper easements, a basis is found by Mr. Justice Holmes and others for their development from certain improper or spurious easements, as they are called. These imposed active obligations upon land and were enforced from an early day. Such was the obligation to fence, or the obligation to repair. Y. B. 18 E. III, 23, where there was an order to repair and damages given. 11 R. II, cur. clau. 5 L., 5 E. III, 100, which were orders to fence cited in Fitzherbert. And for the writs de curia reparanda, and de curia claudenda, means of enforcing repairs and fencing, see Fitzherbert Nat. Brev. 127, 128.

But it may well be doubted whether such a duty could ever be imposed by the Common Law. In *Tenant v. Goldwin*, 1 Salk. 360, s. c. 2 Ld. Raym. 1089, the question came to the attention of Lord Holt, and he expressed himself as of the opinion that such a right was impossible at the Common Law, but that the writ de reparatione facienda must be based upon a custom of the particular locality. And there is little doubt that Fitzherbert thought the same thing; for in Fitzherbert's *Natura Brevium* 128, upon the writ de curia claudenda, it is said that prescription must be alleged, for if the claim be by indenture or composition he shall be put to his writ of covenant, citing 22 H. VI, and Book of Entries fol. 32 to support him.

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profits or privileges out of the former." But for this he cites only American cases, necessarily modern. Cf. Goddard, on Easements, p. 89.

Gale on Easements, p. 530, also comes to the conclusion that there was no such spurious easement at Common Law as that to repair, believing Holt's view in *Tenant v. Goldwin* sound; and an able American opinion to the same effect was delivered by Chief Justice Parsons in *Loring v. Bacon*, 4 Mass., 575.

Unluckily, however, there seem to be no cases where these spurious easements had been created by writing at a time when their decision would have been conclusive in support of their having such a nature as would admit of it; as the cases of obligation to repair were worded and decided as covenants without expressly indicating the nature of the right, whether against the land or the person. And little reliance can be placed upon the wording of the writings by which clearly proper easements have been enforced, partly because they have arisen after the question of the nature of the covenant had been confused, and partly because the discussion of them had been after the law had lost whatever strictness it may once have had as to the wording of the instrument by which a clearly definable right was intended to be granted.

And for the same reasons, conversely, the use of the word "grant," importing a covenant, would be of little assistance to prove that a covenant is a grant of a right in the land, after the formative period of the law had passed. Sheppard's Touchstone, p. 231, tells us that while the words "dedi" and "concessi" were the most apt to import a grant, others might be used as well. And in *Sir Orlando Bridgman's Conveyances*, p. 165, in a covenant to pay taxes, the covenantor expressly did "covenant and grant to and with," etc., to pay taxes and assessments. "Covenant" operated as a grant in *Lord Huntingdon v. Mountjoy*, 4 Lev., 147; and in *Viner's Abridgment under Grant*, p. 51, may be found the following: "Proviso semper and the vendee covenants with the vendor, his heirs and assigns that the vendor, his heirs and assigns may dig for ore in the wastes of the manor sold; this is a new

grant of an interest to vendor to dig in the wastes, and not a bare covenant, but vendor cannot divide such interests. Vendor may assign to several, but they must work together." So in *Hob. 57*, a "grant" by the Bishop of Winchester that the mayor might build on vacant lots in the city was taken as a license or covenant. *Mayor and Commonalty of Winchester's Case*. But compare *contra Jones v. Cloak*, *Hard. 48*, citing *Buckley's Case*, *2 Co. Rep. and 11 Co. Rep., 48*. And note *Holmes v. Seller*, *3 Lev., 305, Vin. Gr., 104*.

Moreover, an agreement to repair amounted to a covenant in *Sir J. Brett v. Cumberland*, *3 Bulst., 363; s. c. Cro. Jac., 399; s. c. Popham, 136*. *Holder v. Taylor*, *Brownl. 23; s. c. Hob. 12, pl. 24*.

But at any rate these spurious easements or customs when established by prescription did attach to the land itself and the question resolves itself into this: Can these running obligations be established by act of the parties? and when similar obligations are established by clear covenants, do they necessarily have the same effect and run without reference to privity of estate, attaching to the land itself, however acquired?

Customs were not limited to fencing and repairing. There was the duty, based upon custom, to keep a bull and a boar for the use of a parish. *Yielding v. Fay*, *Cro. Eliz., 569*. And there were numerous instances of the duty, based upon prescription, for a prior to provide singing periodically in a chapel on a certain manor. *Y. B. 21 E. I, 182 (semble); Y. B. 22 H. VI, 46, Prior of Woburn's Case*, where "cessavit" was allowed against the abbot for not singing in the plaintiff's chapel.

Two active duties established by contract and generally thought to go with the land itself, were homage and rent; and on these some importance is laid. But the duty seems hardly of the nature in question. The obligation of homage was to the lord, and however tenants disseised each other,

the lord was not affected so long as the tenant chose to give him homage and he chose to take it. It was clearly a personal relation,<sup>1</sup> one of the features of the contract of warranty itself; and each new occupant became a tenant when the lord accepted his homage.<sup>2</sup> It bound the land, because the lord expected it of every occupant of the land, and if one tenant disseised another the lord would turn the disseisor out if he did not give the homage. So far as the lord was concerned there was no disseisin of him until the tenant refused to give the homage. Holmes, Com. Law, 288, citing Bracton f. 46b.

And the same may be said of the active duty involved in rent; for only when the disseising tenant refused to attorn to the lord, and to pay him rent, did the lord lose his right of distraint and become disseised. Holmes' Com. Law. 389.

In the sense of rents granted between parties other than in the feudal relation it is true that rent did attach to the land so as to give right against disseisors. And in this sense rent does furnish an analogy to the other cases of customs. The instances of rent so attached to the land and binding any holder are too numerous to require mention, as rent has always been recognized as a subject of grant; and is, at least in later years, as often enforced by action of covenant perhaps as in any other way. Thus it was held that the term "reddendo" in a deed imported a covenant to pay rent. Viner Abr. Covt., p. 378; *Harper v. Burgh*, 2 Lev., 206.

But it seems that in the early year book cases when rent was enforced by covenants the rent was stipulated for by means of a covenant; see Y. B. 21 E. I, 136; and in Y. B.

<sup>1</sup> Bracton, f. 382, says that the lord who has taken homage is bound to a warranty through the homage taken by him; unless, indeed, it is stipulated to the contrary. Bracton, f. 390b.

<sup>2</sup> Note Keilway, 130 pl. 104. The court there said: "For if any true tenant be disseised, if I wish I can then accept the disseisee [disseisor?] for my tenant, and then is the fee simple in the disseisor, and he holds this of me, for he cannot compel the lord to avow upon him."

22 E. IV, 1, covenant was allowed because the rent was granted in a fine, and the court said a fine was a covenant in itself. Y. B. 22 E. IV, 14, is not clear, but in Y. B. 14 H. VII, 14, where the action was against a disseisor the form of action was debt. And cf. *Watts v. Ognell*, Cro. Jac. 192. Moreover rent had so long been regarded as a right distinctly capable of actual possession that these other rights under present considerations rising subsequently, however similar to rent in some respects, need be by no means identical in nature.

Homage and rent must be left out of consideration, and we return to the rights clearly based upon prescription and their handling in connection with covenants. Of these the formative period of the law gives us three cases. In Y. B. 21 E. I, 182, covenant was brought for not singing in a chapel, the plaintiff alleging that he was seised of the singing. The defense was that so alleging he could not sue in covenant. The court said, "Do you think he could not recover even if he had not alleged seisin?" The case went off on the question whether the plaintiff was to furnish chalices and vestments, so it may seem that they were inclined to allow the action, though the right was distinctly based upon prescription. But it does not indicate that a covenant establishing such a duty would not confer a different kind of right from that based upon prescription.

The next case is *Pakenham's Case*, Y. B. 42 E. III, 3, where the right was established by a distinct covenant by the defendant's predecessor to sing in a chapel of the plaintiff's ancestor, and there is certainly great doubt what was the ground of the decision. After being turned out of court on his claim as being heir, being only a younger son, the plaintiff proved himself assign of the manor and alleged privity of estate. The court spoke of personal covenants, privity of estate, grants, and prescription, and finally allowed the plaintiff his action; Thorpe allowing it apparently both on ac-

count of privity of estate and because he alleged the running of the duty time out of mind; and Finchden because it was a covenant, while Wyckinham seemed to think the covenant would not run. As there seems not to have been any passing of land between the original parties, the case may have been based upon prescription, or it may have been based upon the idea that the right created by the covenant attached to the plaintiff's land; but if it does decide that this duty can be created by a covenant, it stands for the proposition merely that under circumstances which show such an intention a covenant may operate as a grant; it does not decide that all covenants are grants of incorporeal hereditaments.

The third case is *Horne's Case*, Y. B. 2 H. IV, 6. There the plaintiff alleged a covenant between the defendant's predecessor and his own ancestor to sing in a certain chapel, but it was not proved clearly that the plaintiff owned the chapel though he seems to have proved himself heir. One of the judges said that if the covenant runs upon possession of the manor the plaintiff as heir should not have action. But somehow they thought that the matter was merely spiritual and it mattered not whether the plaintiff owned the manor or not, as he would derive as much good from the singing in the chapel of another; and so they allowed the action. It can hardly be said, therefore, that the case decides anything. It says nothing to indicate the right as an incorporeal hereditament, and if it gave the action merely because the plaintiff was heir it is no longer law.

The first case then was a right based upon prescription, probably enforced by an action of covenant; the second was a covenant, perhaps enforced as conferring a right like those based upon prescription; the third adds nothing. Then the most that the three cases represent is that certain incorporeal rights may be created by covenant and run as easements, and may be enforced by the action of covenant. If the cases decide this their soundness may well be doubted in the light of



the rise and theory of easements. Certainly no basis for imposing such rights in land can be traced to a rudimentary theory in the Common Law. Everything would seem to point to the soundness of Lord Holt's conclusion that active obligations when inhering in the land are mere local customs enforced by the courts.

But assuming that the law does accord with the construction of these three cases in support of active easements before it is accepted that every active duty created by covenants inheres in the land as an incorporeal hereditament it is necessary to examine other early cases enforced clearly as covenants.

In Fitzherbert's *Natura Brevium*, 145, a case from 4 H. III, 57, is noted. "A man covenants that neither he nor his heirs shall erect any mill in such a place, and afterwards he erects a mill, and an action of covenant is thereby brought by the heirs, and well." It can hardly be said that this agreement is by nature an incorporeal hereditament nor can it be assimilated to a right based upon prescription.

Again in Y. B. 21 E. I, 136, the assignee of a covenantee sued on a covenant to grant a rent if the covenantee's land would not produce sixteen shillings' worth. The rent had not been granted, but it was a covenant to grant a rent, the covenant being with R., his heirs and assigns. There was no incorporeal hereditament granted here, and it was enforced against the covenantor's heir.

But the case which seems to throw most light on the question is in Y. B. 4 E. III, 57. N. Abbot de H. brings covenant against Robert de C. upon a covenant between the Abbot's predecessor and one Roger, the defendant's ancestor. Roger had granted a mill to the Abbot and his successors, and covenanted that neither Roger nor his heirs would build another mill on the same tenement without the Abbot's consent. After considerable argument it appeared that a mill had been built in the ancestor's time and the heirs had merely refused to

tear it down. It was questioned whether an action could be brought by the successor against the heir and whether there could be judgment that the mill be torn down. Finally the court ordered the defendant to answer over, the defendant, however, calling for judgment on the count because it was sought to hold him to the ancestor's covenant without proving assets by descent.

So in 7 E. III, 65, the case came up again, the Abbot asking judgment for time past and a destruction of the mill for the future. The defendant's counsel said, "You do not assign any tort that Robert has done, nor do you assign any tort in our time; for you assign that the mill was built in time of your predecessors and our ancestors." The Court replied, "If it be law that the covenant is binding between the parties and the heirs of one party and the successors of the other party so that the covenant is perpetual, the covenant will first also hold against the heir of the party as against the party himself. So if he shall be able entirely to perform the covenant in its nature, he shall do it; and if not he shall do what he can. And if he be tenant of the mill he shall destroy the mill for the future," etc.

But that did not seem to satisfy all, for Shard replied, "Sir, the record appears that Robert thus continued the tort which his ancestor did," but added, "Still he is tenant of the mill, and so he can destroy the mill." But the defendant said, "The covenant is not made to destroy the mill, and more it is framed upon negative words which do not bind in law," citing the promise not to sow land as unenforceable. To which the Court said that would be so were there no covenant, but a covenant made it otherwise.

Though the case may have been the enforcement of the ancestor's covenant, there was no question that the covenant could bind the parties' heirs and successors perpetually, for breaches in their own time of holding. Nor is there any suggestion that the nature of the right is anything but a

covenant. The parties all describe it as such, operating on the person of the successors in title, provided they hold the land. And as the case has nothing of the muddiness that pervades *Pakenham's Case* and *Horne's Case*, it may be accepted without much hesitancy as indicative of the state of the law.

And why should not the form of the covenant indicate best its origin? Why should he name his heirs and assigns if it were not originally necessary that they be named as in warranty? Surely much would be necessary to prove anything but a personal relation in such an obligation. The party covenants for his successors in title to perform the agreement to the successors in title of the covenantee. Unless some broader intent can be proved, why should others be included? It will be assumed, then, in discussing the law of covenants that they have their origin in warranty, and that only privies in estates are concerned in their operation.

## CHAPTER IV.

### THE LAW OF COVENANTS DOWN TO THE STATUTE OF 32 HENRY VIII.

It was attempted in the preceding chapter to prove that the action of covenant early operated to enforce the relation of warranty, and that the right to make use of such an action was allowed to run with the land. It was also shown that almost simultaneously with that practice covenants to perform other obligations than warranty were enforced between land holders other than the original parties to the covenant. This was introduced to show that the running of these covenants originated in the running of warranty with the land. But irrespective of their origin, those cases prove another and more important fact, and that is that these covenants to perform various duties did run, benefits and burdens, with certain lands. Singularly enough this has been almost universally denied in modern times, and while, as we shall see later, there have probably been no modern decisions on the point in England, there has been a great deal of dictum and enough cursory discussions of the subject to have a great effect upon the law.

What brought about the idea that covenants could not run, it is difficult to say. Presumably it arose from a misconception of the full purpose of the Statute of 32 H. VIII, c. 34, and a misunderstanding of the preamble of that statute. The statute will be examined in the next chapter, to see how far it warranted an inference that at its passage covenants did not run, but later judges so expressed their conclusion as to the Common Law. And as some very great judges made these statements, they have been quite generally accepted

ever since. I Wm. Saunders, 240, n. 3, to Thursby v. Plant; Barker v. Damon, 3 Mod., 337; Thrale v. Cornwall, 1 Wils., 165, and Webb v. Russell, 3 T. R., 401, give some of the instances where the opinion was expressed that covenants did not run generally with the land at Common Law. But perhaps the chief medium in bringing about a frequent reiteration of that notion is the collection of cases and their exposition given in the notes to Spencer's Case in the various editions of Smith's Leading Cases. And to greater complicate matters, it appears from the study of cases there made that the benefit of covenants was allowed to run with land to others than the contracting parties, and that the limitation of the Common Law fell only upon burdens. It becomes interesting, then, to see what was the law of covenants running with the land down to the Statute of 32, H. VIII, and then to see what effect that statute had upon the law.

Regarding warranty as a basis, it may be tentatively expressed that the benefits and burdens of covenants should run alike so far as heirs and assigns are mentioned in the covenant, the lands themselves always being assets to meet the claim. There should be the transfer of some sort of interest in land; privity of estate should be necessary, and somehow the covenant should affect the land.

Several difficulties must have arisen from the essential difference between the obligation to warrant and almost any other obligation that a covenantor might assume. In the first place a warranty necessarily affected directly the land conveyed, so no question could arise as to the relevancy of the obligation to the land in whose hands soever the land might be. But as a man might covenant to do any conceivable thing, the point might often be raised that a particular covenant was too remote to be allowed to follow the land to new parties. From this quandary the medieval lawyers were not without an escape. They asserted that covenants to run must touch or concern the land, and judging upon this uncertain require-

ment they ruled out many covenants as merely personal, and enforceable between the original parties alone.

In the second place, a warranty, involving the possible duty to give other property to the value of the property granted, was necessarily a direct burden on any other land the warrantor might have, and especially upon that out of which the parcel was granted. That is, it immediately concerned all the warrantor's lands. But a covenant, though touching and benefiting the covenantee's land, might have no connection whatever with lands of the covenantor. Such was the covenant of a prior to sing periodically in a landowner's chapel. If the prior's covenant did not burden any particular land, there would be no reason why it should be anything but a personal obligation. It is evident that the trouble is fundamental. Warranties from their nature can rest as obligations upon the grantor's side only, as it is he who must furnish more land; while covenants can lie as obligations upon either the grantor or grantee. Therefore, the burden must directly affect the covenantor's land, though he be the grantee.

In the third place, the warranty, it will be remembered, did not bind alone the remainder of that parcel out of which the warranted portion was granted. It bound secondarily all other lands of the warrantor. So from similarity it would seem that it is enough if the burden of a covenant affected any land of the covenantor. But it generally appears, possibly to avoid remoteness, that covenants bind only particular lands, the grantor's covenant burdening only the remainder of the land from which the parcel passed, and the grantee's binding the particular land received. The ordinary case is such as a covenant not to build beyond a line on the granted premises, for the benefit of remaining lots, a covenant to keep clean a drain from the grantor's premises through the granted premises, a covenant to keep up a way on the granted premises for the benefit of the grantor's premises. While this

may not be absolutely followed in the requirement that the grantee's covenant affect other lands of the grantor; for in some cases, as where a land company may grant its last lot with restrictions, the grantor may have no other lands left;<sup>1</sup> so far as has been observed the grantee's covenant must burden the received premises, and no other.

A fourth problem will arise as to whether it is necessary that land pass between the parties, as in case of warranty, in order to institute a covenant which can run. While, as was seen in the first chapter, there is some doubt as to that in the early cases, it has been generally settled in modern times that a covenant cannot run in the air. Indeed in England an incorporeal hereditament is not enough to insure the running of a covenant. *Randall v. Rigby*, 4 M. & W., 130; *Milnes v. Branch*, 5 M. & Sel., 411. But for the law on this point reference may be had to later chapters.

For the verification of propositions thus set forth it is necessary to examine the reported cases of covenants gathered in their order from the Year Books. The first case we have on covenants is given by Fitzherbert, F. N. B., 145, note, and purports to be taken from the roll of 4 H. III, 51, which is not in print. It is as follows: "A man covenants that neither he nor his heirs shall erect any mill in such place, and afterwards he erects a mill, and an action of covenant is thereupon brought by the heir, and well." And Fitzherbert continues, "and so it is if the lessor oust the lessee and dies, or tenant in tail leases for years and dies and the issue ousts the tennor, he shall have covenant against the executors."

It is not stated that this was accompanied by the passing of land, but from Fitzherbert's talk about leases, it would appear that he thought that it was. The covenant touched or concerned both pieces of land, and it would seem that it was intended to burden the land of the covenantor, for he covenanted that his heir should not build. The enforcing it be-

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<sup>1</sup> And see Moore, 179, pl. 318, post, p. 66.

tween heirs for the breach of the ancestor means nothing, however; for the executor had not yet developed and the covenant, though personal, might have been enforced in the same way. But the statement in Fitz. Abr., Covt. 30, giving Mich. 18 H. III, that "action of covenant was maintained by assign by agreement of court for term of years," if true, would show that at least benefits could run to assigns. That the benefit may run seems to be farther proved by the next two cases. In Y. B. 21 E. I, 136, there was a covenant by W. to one Roger, his heir and assigns that W. would enfeoff the covenantee, his heirs and assigns of 16 shillings rent in Napitone if it could not be conveniently provided from other lands of the said Roger. The action of covenant was brought by Roger's assignee against the heir of the covenantor. This seems to be a sort of guaranty that certain lands of Roger, possibly granted him by W., should yield 16 shillings rent. The holding the heir again proves nothing, but it appears clearly that an assign can sue on a covenant, although he may have been merely assignee of the rent which W. had covenanted to grant. Y. B. 31 E. I, 142, allows an assignee to sue on a covenant of warranty, so, however cloudy the previous case might be alone, taken together there is little doubt that all that time covenants could run, at least so far as benefits are concerned.

The running of burdens, finds recognition in Y. B. 4 E. III, 57, reheard in Y. B. 7 E. III, 65, and as this is the only case except those running against corporations sole, and those involving the burdens in leases, it must be carefully considered. The case has been discussed already in the third chapter to show that covenants were not regarded as creating mere incorporeal hereditaments. The action was brought by an abbot against an heir whose ancestor had granted a mill to the abbot's predecessor, covenanting that neither the grantor nor his heir would build another mill on the same tenement without the abbot's consent. The covenant had



been broken in the covenantor's own life time, and the case involved much discussion about holding heirs on ancestors' covenants. But the remark of the defendant, "Nor do you assign any tort in our time, for you assert that the mill was built in the time of your predecessor and our ancestors," and the reply of the court, "if it be law that the covenant is binding between the parties, and the heirs of one party and the successors of the other party so that the covenant is perpetual, the covenant will first hold against the heir of the party as against the party himself," and the subsequent statement, "Sir, the record appears that Robert has continued the tort which his ancestor did,"—all show the idea accepted that the burden of a covenant can run with the land, though this one may have been enforced as a personal covenant of the ancestor.

Other ordinary features in the running of covenants clearly appear; there was a grant of land, and the covenant touched both pieces and bound the remaining portion of the land of the grantor. There was privity of estate between all the parties, and the heir was expressly named as bound.

It was said that this was the only case clearly setting forth the running of burdens, not because there is anything in other cases to point out a contrary view, but because other cases have been claimed to rest upon other principles. The next two cases were Pakenham's Case and Horne's Case, in which the burden was enforced against an abbot's successor, and it has been suggested that the defendant, being a corporation, was perhaps bound personally as an entity without reference to the running of the covenant. It is very doubtful, however, whether the conception of a corporate entity had by that time sufficiently impressed itself upon the lawyers to enable them to conceive of such an effect. Land given to a corporation sole had to be given to the abbot and his successors, and while the idea of a special capacity of holding as bishop or abbot may have been realized, at the rise of these cases it is

not likely that the notion that the successor was the same person and not a new person and that the obligation was the same obligation and not a new obligation were yet to be expected. Compare the discussion of fictitious persons in I Pollock and Maitland's Hist. Law, 485, et seq. The idea of a corporation as a never dying person is very different from the idea of identity of ancestor and heir; for while the latter may be recognized by Bracton, in his time the idea of personal right accruing to an abbot and being transmitted to his successors is clearly repudiated. "Each successive abbot might sue for lands of which the church had been dispossessed during the abbacy of one of his predecessors, but if a claim for compensation in respect of some unlawful act, such as an abstraction of the church's goods, accrued to one abbot, it died with him and was not competent to his successor. *Actio personalis moritur cum persona*, and here the person wronged is dead, for he was a natural person and could die. To make the law otherwise a clause in the Statute of 1267 was necessary (St. Malbridge)." I Pol. & Mait., p. 485.

If, then, the connection between predecessor and successor in a corporation sole was not the identity of a corporate entity, it was the same as the relation between any ancestor and heir; and it was handled as the same thing in the case in 7 E. III, just discussed, where the court said, "If it be law that the covenant is binding between the parties, and the heirs of one party and the successors of the other party so that the covenant is perpetual." Therefore actions allowed for breaches occurring during the holding of successors must sustain the running of burdens, as a covenant broken by the holder of the land and affecting him personally as successor or heir of course binds him for the sole reason that he is successor to the land. In *Horne's Case* and in *Pakenham's Case*, however, while the breach was by the successors, the nature of the covenant was such that it has been doubted whether it did really bind them as holders of land. The

covenant was a covenant to sing or to hold service in a chapel on the covenantee's land. This Mr. Justice Holmes calls a service and says the burden of it "does not fall upon land even in theory, but the benefit . . . might go at Common Law with land which it benefited." H. C. L., p. 405. But it must be observed that in neither Pakenham's Case nor Horne's Case was the obligation upon the defendant discussed, all the argument being about the running of the benefit. So while the duty was a peculiar one, considering that it was an obligation binding upon a successor in title as a successor's obligation apart from any idea of corporate continuance, it is not improbable that it was interpreted as an obligation binding the successors as holding some ecclesiastical possession.

The fact that it ran without a grant of freehold, and the question whether it was an attempt to create an incorporeal hereditament by means of a covenant have been considered in the third chapter. Indeed if it was an attempt to create an incorporeal hereditament, it can hardly have been anything else than a burden imposed upon some land and running as such. As an obligation imposed as an easement or incorporeal hereditament it is not conceivable as anything else, for all easements are rights gained against land, the peculiarity of this being merely its active nature.

One other case recognizing the running of the burden of covenants is reported in Brooke's Abridgment, Covenant, 32. It professes to abstract a case decided in 25 H. VIII, and was probably the last case involving these covenants before the Statute of 32 H. VIII. Brooke says that an assignee of a lease for years imposing a covenant to repair, was held liable to the lessor on the covenant, adding that the assignee may sue the lessor also on covenants by him. Before the Statute of 32 H. VIII, there was no essential difference between the assignee of a lease subject to a covenant and the assignee of a fee subject to a covenant, so far as so called

privity of contract was concerned; so there really appears no reason why the proof of the running in one case should not prove the running in the other. The later lawyers were unwilling to grant that, however, and so the statement was made probably on the authority of this case, though not declaredly so, that before the Statute of 32 H. VIII, at Common Law covenants ran with the lease, but not with the reversion. *I Wm. Saund.*, 240, N. 3; on *Thursby v. Plant*; *Webb v. Russell*, 3 T. R., 401, per Lord Kenyon. So, however convincing the case in *Brooke* may be to the investigator, it would be generally accepted as of little value in supporting the argument that the burden of covenants run with land.

Little appears in the cases immediately after the statute to throw great light on the law before the statute was enacted. Indeed the question seems to have been little discussed. Moore reports a case, however, decided late in Elizabeth's reign, which seems to endorse the running of benefits; and while it comes too late to be convincing proof of the early law, it may be regarded as cumulative evidence. Moore 179, pl. 318, reports that, "a man made feoffment by deed indented, receiving rent, suit at court, and relief, and by the deed the feoffor granted that if the feoffee, his heirs or assigns should be distrained to perform several services reserved in the deed, then it should be allowable to the feoffee, his heirs and assigns to distrain in the manor of D. and hold the distress until they should be satisfied by so much as they had sustained in damages by reason of the said distress. The feoffee made feoffment over, and accordingly he moved if the second feoffee might distrain, and the court said so because the covenant ran with the land. And per Perriam, J., if the word 'assigns' was not there nevertheless the word 'heirs' would avail to guarantee the distress to the assign."

The learned editor of *Smith's Leading Cases* seems to have overlooked this case, for he does not rely upon it in making his distinction between the running of benefits and

the running of burdens. But while the case makes no such distinction, as the distinction has been taken by this important reviewer and later judges, the case will not weigh much to prove that covenants generally run with land. It does help to this extent, however, that it attacks the soundness of statements that covenants running at Common Law were confined to leases, and if acceptable to that end, it eliminates Sergeant Williams, Lord Kenyon, and their associates from those to be met in the argument as to the running of covenants, and leaves only the editor of Smith's Leading Cases and more recent judges.

But before laying aside the early law recurrence must be had to Pakenham's Case and Horne's Case to investigate other points not so thorough-going but yet very important in an interpretation of the law. In Pakenham's Case, Y. B. 42 E. III, 3, there was a covenant by a prior for himself and his successors to sing in a certain manor of the plaintiff's ancestor, but it does not appear that the covenantee's heirs and assigns were mentioned. As a matter of fact the plaintiff turned out to be a younger son and so could claim only as an assign. Mr. Justice Holmes says it is generally taken that assigns were not mentioned, and presents the absence of mention as evidence that the right conferred by the covenantor was a hereditament and not a mere covenant. The conveyance of such a service could hardly require mention of assigns, it is true, if properly made; but granting that such was here intended, conveyed in the language of a covenant, it is strange that all the requirements of covenants were not carried out, as earlier authorities seemed to require in assumed obligations the mention of assigns. Moreover the exact wording of the covenant is not given, so it is not exactly safe to assume that assigns were not named. It was very early to find the law carrying a covenant according to the real intention of the parties instead of confining the running to the letter of the creating instrument. Brooke,

Covenant, 32 (discussed above), reporting from 25 H. VIII, that the assigns of a lease may sue the lessor, adds that it might be done without the assign being named, and for this he cites 48 E. III. But as no such statement is reported in 48 E. III, Brooke's statement can hardly be relied upon. So the first clear statement of such an implication appears in the case reported above from Moore, 179, pl. 300, where the benefit of a covenant was allowed to run to an assign, and Perryam J. said that the word "assigns" was not there, but that the word "heirs" would avail to guarantee the distress to the assigns. Not very much, therefore, can be deduced, one way or the other, from the alleged omission of assigns from the covenant in Pakenham's Case.

But a larger difficulty with the case, if it is to be regarded as a precedent for the law of covenants, is that there was apparently no transfer of land between the original parties; indeed the covenanting prior seems to have had no connection whatever with the land on which he had to sing. Mr. Sugden does not admit this, but thinks the prior had an interest in the land. But if there were such an interest in the prior, it would hardly serve to simplify matters. It seems unavoidable to say that if the case is really the running of covenants, it does gainsay the idea of the necessity for a conveyance—unless it could be said that, like the grant of a rent, it was the grant of the service together with a covenant that the service should be performed. This is of course untenable, however.

But the most important question raised by Pakenham's Case is the necessity for privity of estate in the parties to whom covenants are to run. To be sure, there was privity in Pakenham's Case; but if assigns need not be named, and if there need not be any conveyance of distinct property, and if, as some of the judges thought, the covenant is annexed to the land as a part of it, why should not the covenant run to

any possessor in recognized possession of the land, irrespective of his method of procuring it.

It has been shown in the third chapter why it seems likely that covenant ran only to those in privity of estate. Privity of estate refers to those who were legal and rightful successors to the estate of the parties to the covenant. Indeed it probably means successors to land granted by one of the covenanting parties from a parcel held by the other; for in the time of implied warranty tenure always made a privity of estate between every holder of the parcel and every holder of the rest of the land, subinfeudation not being destroyed. As this was the law of warranty, this would be expected in the law of covenants. But if this is the law of covenants some of the judges in *Pakenham's Case* certainly had in mind something else. They may not all have thought that it was the ordinary covenant; one thought that it would not run at all. But the most satisfactory disposition of the case seems to be to regard it as an attempt to make a local custom, enforceable as a right to be acquired by prescription, have the effect of a covenant and as such run with the land. The case, then, is of little service to the law of covenants, beyond revealing the acceptance of the notion that covenants can run with land.<sup>1</sup>

Almost as much trouble has been raised by *Horne's Case*, Y. B. 2 H. IV, 6. The action was by an heir against a prior's successor for not performing divine services in the ancestor's chapel. The plaintiff had evidently tried to count both as heir and as holder of the land. If the plaintiff sued as heir the case would occasion no difficulty; for it would have been merely enforcing a personal covenant to the ancestor.<sup>2</sup> But the court seemed to halt between that and the

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<sup>1</sup> For discussion of *Pakenham's Case* see Co. Lit., 385a; Smith's *Leading Cases*, Note to *Spencer's Case*, 8th edition; Sugden on *Vendors and Purchases*, 14th ed., p. 586; Rawle on *Covenants for Title*, 5th ed., p. 295, note; Holmes *Com. Law*, p. 395.

<sup>2</sup> As a personal covenant it is rather surprising that the plaintiff

notion that he sued as landholder; and while it was proved that he was not holder of the land as assignee proper but in his wife's right, yet the court seemed to think that he should have his action because he could get as much good out of the singing in another's chapel as in his own; though this is hardly a good reason.

As there appears no grant of land in this case, the recognition of the plaintiff's right as landowner could only be on the principle of *Pakenham's Case*; and again we get nothing from the case but the mere fact that covenants may run with land, for the court seems to have thought that the plaintiff could sue either as heir or as landholder. *H. C. L.*, 399. *Mr. Sugden*, however, says that the case decides that privity is necessary, and thinks this is confirmed in *Y. B. 1 H. IV*, 1. —*Sug. V. & P.*, 14th ed., p. 588.

Considering, then, that nothing has so far been discovered to controvert conclusively the soundness of the propositions tentatively expressed at the beginning of this chapter and embraced in the definition in Chapter I, we are now prepared to examine the statute of 32 Henry VIII, Chapter 34, which may be called for convenience the Statute of Leases, to learn what effect it had upon the Common Law, and to make what inferences are possible from it as to the law before it was enacted.

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could sue as heir at this time, for the executor had already been developed. In *Y. B. 48 E. III*, 2, *Percy* says that not even the executor could be sued on a covenant. This must have been among the last cases of such general right to heirs. In 32 H. VI, 32, *Littleton* says the heir may be sued in covenant on a lease for ouster if he have been mentioned and have effects; but if it is to build a house [a personal covenant, it would seem] then the action of covenant must be against the executor.



## CHAPTER V.

### THE STATUTE OF 32 HENRY VIII, CHAPTER 34, AND ITS EFFECTS.

THE STATUTE.—Where before this time divers, as well temporal as ecclesiastical and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry manors, lordships, fermes, meases, lands, tenements, meadows, pastures or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants and agreements to be performed, as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors; (2) and forasmuch as by the Common Law of this realm, no stranger to any covenant, action or condition, shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereunto, by the reason whereof, as well all grantees of reversions, as also all grantees and patentees of the King our sovereign lord, of sundry manors, lordships, granges, fermes, meases, lands, tenements, meadows, pastures, or other hereditaments late belonging to monasteries, and other religious and ecclesiastical houses dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come to the hands and possession of the King's majesty since the fourth day of February, the seven and twentieth year of his most noble reign, be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the

breach of any condition, covenant or agreement comprised in the indentures of their said leases, demises and grants; (3) be it therefore enacted by the King, our sovereign lord, the lords spiritual and temporal and the commons, in this present parliament assembled, and by authority of the same, That as well all and every person and persons, and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of our said sovereign lord by his letters patents of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the King's hands since the said fourth day of February, the seven and twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, (4) as also all other persons being grantees or assignees to or by our said sovereign lord, the King, or to or by any other person or persons than the King's highness, and the heirs, executors, successors and assigns of every of them, (5) shall and may have and enjoy like advantages against the lessees, their executors, administrators and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; (6) and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said lessees and farmers and grantees, their executors, administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, (7) in like manner and form

as if the reversion of such lands, tenements or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters patents had been made by his highness.

II. Moreover be it enacted by authority aforesaid, That all farmers, lessees and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life or lives, their executors, administrators and assigns, shall and may have like action, advantage and remedy against all and every person and persons and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of the King, our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them might and should have had against the said lessors and grantors, their heirs and successors; (2) all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted.

THE LAW IN THE SEVERAL STATES RELATIVE TO THE STATUTE  
OF 32 HENRY VIII, CH. 34.

Throughout the United States and territories the subject matter of the Statute of 32 H. VIII, c. 34, has been handled in various ways. In a majority of jurisdictions, the statute has been in effect re-enacted. While the wording is always different from the original statute, the same end has probably been attained, though several of the statutes have been fuller, enacting some of the constructions put upon the

original statute. Nearly all the states which have attempted to codify the Common Law are included in this number.

Other jurisdictions, however, have merely generally enacted that the English Common and Statute Law down to a certain time shall be considered part of the law of those jurisdictions, so far as not in conflict with particular enactments; and these, of course, may be taken as enacting the English Statute in term.

Still other jurisdictions have made no enactment on the subject, though early decisions have indicated that the English Statutes have been generally accepted along with the Common Law. While several others have given no expression, judicial or otherwise, of a general acceptance, but have enforced this particular statute without comment; and this will probably be the case with others where no decision has so far appeared.

In one state, Ohio, it has been held that the Statute of 32 H. VIII is not in force at all, and hence some misconception of the Common Law has followed.

The following list of code and statute references and decisions in the absence of statutes has been inserted for convenience in ascertaining the law in the several states. It has not been attempted to give always the last edition of statutes, as it is not a subject that would be ordinarily changed. In all cases the year of the edition is indicated, however, and it is generally the latest edition:

Alabama.—The English Statute seems to have been accepted.

Merchants Ins. Co. v. Mazange, 22 Ala. 168.

Arkansas.—The Common and Statute Law generally re-enacted. See R. S. 1894, §600.

California.—Statute re-enacted. Civil Code ed. 1880, §§1460-1466.

Colorado.—English Law accepted. Cf. Hayes v. N. Y. Gold Mining Co., 2 Col. 273.

Connecticut.—No statutory enactment.

- Delaware.—Re-enacted. R. C. 1893, c. 120, §1647.
- Dakota.—Re-enacted broadly. Code 1877, §§817-826.
- Florida.—No reference to statute.
- Georgia.—No statutory reference.
- Idaho.—Re-enacted. R. S. 1887, §§2876-7.
- Illinois.—Re-enacted. St. 1896, c. 80, §§14-15.
- Indiana.—Re-enacted. R. S. 1896, §5218.
- Iowa.—Eng. Law apparently accepted. *Collamer v. Kelley*, 12 Ia. 319.
- Kansas.—General re-enactment of Common Law. R. S. 1897, p. 99.
- Kentucky.—No statutory enactment, but all statutes before Jac. 1 are accepted. See *Ray v. Sweeney*, 14 Bush. 1.
- Louisiana.—No statutory enactment.
- Maine.—No statutory enactment.
- Maryland.—Good by acceptance. Cf. *Alex. Brit. Stats. in Force in Md.*, p. 335.
- Massachusetts.—No statutory enactment, but apparently accepted. *Morse v. Aldrich*, 19 Pick. 449.
- Michigan.—No statutory enactment. Apparently accepted. *Lee v. Payne*, 4 Mich. 106.
- Minnesota.—English Law accepted. Cf. *Leppla v. Mackey*, 31 Minn. 75.
- Mississippi.—Re-enacted. See Code 1892, §§ 2539, 2540.
- Missouri.—General enactment of Common Law and Statutes before 4 Jac. I. See R. S. 1889, §6561.
- Montana.—Re-enacted. Civil Code, §§1274-5. In Montana covenants in grants, benefits and burdens run by Civ. Code, §1983, et seq.
- Nebraska.—No statutory enactment.
- Nevada.—In force by construction of Act. Oct. 30, 1861, adopting the Common Law, replaced by Gen. St. 1885, §3021. See *Evans v. Cook*, 11 Nev. 69; *Clark v. Clark*, 17 Nev. 124.

New Hampshire.—No statutory enactment, but apparently accepted. *Murphy v. Minot*, 4 N. H. 251.

New Jersey.—Re-enacted. Gen. Stat. 1896, p. 880, §§135-6.

New Mexico.—No statutory enactment.

New York.—Re-enacted. 1 R. S. 747, §§23, 24. Vol. 2, 9th ed. by Bks. & Bro., p. 1820.

North Carolina.—Re-enacted. Code 1893, §§1331-2, 1765.

North Dakota.—Re-enacted. R. C. 1895, §3367.

Ohio.—No statutory reference; apparently the statute is not in force.<sup>1</sup>

Oklahoma.—Re-enacted. St. 1893, §3740.

Oregon.—No statutory enactment.

Pennsylvania.—Re-enacted as to recovery of possession Feb. 20, 1867, P. L. 30, §1. General Common Law and Stat. generally enacted Jan. 28, 1777; see Rep. & Lewis Dig. 106, 1—Cf. *Fisher v. Lewis*, 1 Clark 428.

Rhode Island.—Re-enacted loosely; see G. S. 1896, p. 661; and Eng. Stat. before Independence taken as part of Common Law, id. p. 1108.

South Carolina.—Not included in Eng. Statutes Re-enacted in 1712 (see Grimke S. C. Public Laws); and no statutory reference.

South Dakota.—See Dakota.

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<sup>1</sup> In *Masury v. Southworth*, 9 Oh. St. 340, the court said: "It has been decided by this court that the statute of 32 H. VIII, c. 34, is not in force in this state, and that an assignee of the reversion can not maintain an action upon the covenants in the lease. But if the covenant be assignable in equity, so that an action might have been maintained in the name of the assignor, or relief obtained by a suit in equity, our code of civil procedure operates upon the remedy, even more extensively than the Stat. of 32 H. VIII, c. 34. For whether the covenant be collateral or inhere in the land, if it be assigned, the assignee not only may, but, as the party beneficially interested, must sue in his own name." But compare *Newburg Petroleum Co. v. Weare*, 44 Oh. St. 604, where this decision seems to have been overlooked.

Tennessee.—Common Law and English Statutes enacted generally in Laws Nor. Car. and endorsed in Constitution of Tenn. 1796, Art. 10, §2. See Scott's Laws of Tenn. 1715-1820, vol. 1, pp. 226, 535.

Texas.—Common Law generally enacted. See Sayle's Tex. Civ. Stats. Art. 3258.

Utah.—No statutory enactment.

Vermont.—Common Law adopted generally; see Stat. 1894, §898; and see *Giddings v. Smith*, 15 Vt. 344, that this probably includes early English Statutes.

Virginia.—Re-enacted. See Code 1887, §§2781, 2782.

Washington.—No statutory enactment.

West Virginia.—Re-enacted. Code 1891, c. 93, §§1-2.

Wisconsin.—Re-enacted; see Stats. 1889, §§2194, 2195.

Wyoming.—Common Law and Statutes adopted; see Code 1887, §498.

At the time of enactment of this statute of 32 Henry VIII, c. 34, many lands belonging to the church had come into the hands of the King by operation of the statutes of mortmain, after all evasions invented by the clergy had been of no avail. As this property was not ancient desmesne, the particular crown property, but such as the King could grant out again, much of it had been granted over to patentees and other parties whom the 1st section of the Statute of Leases recounts. Much of this land, however, was subject to leases when it fell into the hands of the King, and coming as it did by forfeiture, the King lost many of the usual incidents of leases which so far help to protect the property. He could not enter upon failure of rent or upon waste; for these were privileges which a grantor only or his heirs could exercise. He could not claim conditions or covenants in the lease, for these all required a privity or personal succession to be enforced. All these, then, were great hindrances to the grantees of the King in their full enjoyment of the property granted, and gave rise to the statute which we are considering.

The statute, then, gave a right to all executors, heirs or assigns of the King to enter for failure of rent or for waste. And it gave to all such the same rights on all covenants and conditions which the original lessors might have had.

It is especially to be noted that the statute did not cover covenants in anything but leases, though it is probable that many of the lands so regranted must have been benefited by covenants running at that time with properties owned in fee. Whether it was only because loss of such covenants was not presented to the legislators that fee properties were not included we cannot tell. It would seem strong to say that it is evidence that other covenants were regarded as incorporeal rights and for that reason ran with the bound and benefited land into whose-so-ever hands they might come. We have no evidence that the law treated covenants by the lessee in leases in any way differently from covenants by the grantee of fees at any time; so if the statute is evidence of anything, the requirement of privity in leases shows that privity was always necessary to take advantage of covenants. And as nobody claims that the covenant of a lessee for years to repair can be called an easement to the reversioner, it must be proved that the law contemplated a difference between that covenant and such a covenant by a fee owner as to keep clear a drain, or it is likely that privity was always necessary.

Now the statute gives to these grantees all the rights which the original lessors had. The lessors had all rights against the lessees and their heirs and assigns when mentioned. So the grantees get the right to sue without being mentioned in the original lease, to claim all the benefits and to enforce the burdens where successors of the lessee were mentioned. Moreover, as the statute mentions all covenants, it should have given rights however nearly the covenants concerned the land; though how far this last was carried out will appear later in the consideration of Spencer's Case.

Then the statute, after remedying the evil caused by lack



of privity between the lessor and the King, does not confine these privileges to grantees of the King, but adds that they shall pass to all assignees of reversion. These assignees, being of the parties, however, did not lack privity and so far as they were mentioned in the leases as beneficiaries got nothing more by the statute. Indeed, Mr. Sugden says that as far as privity existed the statute was merely declaratory, Sugden, V. & P., 14 ed., p. 582. To a certain extent, however, it was effective in that it gives to all assigns the rights of all covenants, and that whether they were mentioned or not.

Now to note what was done on the lessee's side by the statute. Mr. Sugden says, that the legislators added the second clause merely to avoid seeming to give everything to the lords and nothing to the tenants. The one chief benefit they could have received from the reversioners was the benefit of warranty, but that the statute expressly excepted, though if Bracton's notion was true that warranty bound a lord by escheat they would probably have had that otherwise. The statute enacts that the lessees or their assigns might have the same remedies against these new grantees which the lessees might have had against the original lessors. And, whatever Mr. Sugden meant, this was a new right; for it dispensed with the requirement of privity, it dispensed with the requirement of mention, and it dispensed with the requirement that the covenant should closely concern the land. But this is all that the statute granted to assignees of lessees.

It is readily noted, then, that the statute is directed chiefly against the absence of privity, and that it did not assume that it was before impossible for either benefits or burdens to run with the land. On the contrary it is especially assumed that they could run, for it will be noticed that the statute says nothing about giving rights to the covenantee against assignees of the covenantor. It gives assignees of the covenantee in reversion rights which the original covenantee had;

and it gives assignees of the covenantee in lease those rights against assignees of the covenantor which the original covenantee had; and surely it will not be claimed by any one that this verbiage was all idle and that the covenantee had no right to enforce the burden of the covenant beyond the covenantor himself. But as the statute says nothing to make burdens of covenants run, they must run because of the Common Law alone, and it is clear that the notion of the statute assuming that the burden of a covenant will not run is utterly without foundation. Therefore the much exaggerated effect of the Statute of 32 Henry VIII, c. 34, is reduced to this alone: It dispenses with any requirement of privity for an action of covenant on the agreements in leases; it dispenses with the requirement of mentioning the executors, heirs, or assigns for the privileges of action except in the case of the burden of the lessee's covenant, an exception which has been wisely overlooked; and it dispenses with the requirement that the covenant should closely concern the land. The last two points we shall find that Lord Coke mixed up; so that the effect is probably reduced to the dispensing with privity in the reversion alone.

If this conclusion is sound we have but just secured a sound basis for work. Three hundred years of decisions have come down to us based on a misconception or a confused conception of the Common Law, and they present the discouraging labor of being sifted out to see how far it is possible to return toward the simple state of the law from which they rose. The chief blessing of the Common Law presents at once its chief drawback. That pliability which enables it to yield to the requirements of civilization we find has bent it so far away from the truth that it will take a Court of Titans to pull it back. The cumulative mass of decisions ever directed to granting the plaintiff the benefits the judges honestly believed to be possessed, has been shifted from one ground to another, now giving full rights to the assignee, now

denying them after death and administration of the covenantor—until finally the point has been reached in England and in some of our states where a plaintiff can obtain only a limited equitable relief and in many cases is without help entirely.

## CHAPTER VI.

### COVENANTS IN LEASES.

At the expense of breaking somewhat into the line of reasoning it seems best to consider here the operation of covenants in leases since the statute in England, and the resulting law under the same or later local statutes in America. The English statute was said to dispense with the necessity of privity of estate between succeeding holders of the reversion. That statute was broad enough to cover not only grantees of forfeited lands in the hands of the King or lords, but also all grantees or assigns of lands, which would include assignees or disseisors who might be in possession of the lands of the lessor. But there is much doubt whether the average American statute is so broad. As there is no occasion to consider forfeited lands, in the United States, the average statute re-enacting the British statute provides for assignees of the lessor and assignees of the lessee, and as these can in their nature be only in privity of estate, the statute cannot be said to supplant privity at all. This is true, too, of the normal case of transfer of reversions between lessor and assignee in England, so that in the majority of cases, the statute seems unnecessary. But the later judges fail to accept the fact that in these cases the covenants ran by the Common Law. Even Sergeant Williams says "the better opinion seems to be that the assignee of the reversion could not bring an action of covenant at Common Law, but it is given by the Statute of 32 H. VIII, c. 34," *Thursby v. Plant*, 1 Wm. Saund. 240, N. 3, though his citations for this are all decisions made one or two centuries after the statute,—*Barker v. Damon*, 3 Mod.

337; *Thrale v. Cornwall*, 1 Wils. 165; *Webb v. Russell*, 3 T. R. 401.

It is unnecessary to rehearse here the historical proofs why such a position is unsound; but as the lawyers thought the right was given by the statute it is important to see how they decided that the statute accomplished it. Having the operation of the statute in assignments of the land forfeited to the King, and realizing that there was no succession by act of the parties in those cases, the natural suggestion would be that the statute operated always by transferring privity of estate. But as privity of estate in the sense of voluntary succession occurred every day long before the statute, it would not explain matters to say that the statute operated by transferring privity of estate; so the idea arose that the statute operated to transfer privity of contract. Meanwhile the correct idea of what was privity of estate seems to have been confused, and it became an argued question whether the statute operated to transfer the one or the other. The real meaning of the idea that the statute operated by transferring privity of estate probably was that the statute attached the covenant to the property, and then the assignment carried both covenant and property to an assignee. Thus in *Barker v. Damon*, 3 Mod. 337, the court admitted that the assignee of a reversion could bring covenant at Common Law for matters on the land, but thought that the statute attached to the land other covenants and that the assignee's rights to sue on these lay in privity of estate.

But Sergeant Williams' principal case of *Thursby v. Plant* held that the statute transferred privity of contract, and Sergeant Williams came to the same conclusion. This did not satisfy a subsequent editor of that case, however; for it is pointed out, 1 Wm. Saund., p. 241, note, that if the statute transferred to the assignee the privity of contract, how could it be that the original lessor could still sue?—a question of course unanswerable, as two people cannot be the same con-

tracting party at the same time, even though the statute could change parties. As the position had been refused, moreover, that the statute operated by transferring privity of estate, the only position left is to say that the statute operates only to dispense with the necessity of privity of contract. But Sergeant Williams had already admitted that privity of contract was not necessary before the statute, for he said in the same note that covenants probably ran with the lease side at Common Law, though not with the reversion. If, then, covenants ran with the lease at Common Law, as there seems no doubt from the year book citations above, the truth must lie in the idea that the statute attaches the covenant to the land so that it runs to any one within the terms of the statute, or the statute is in the ordinary case of assignment merely declaratory.

The practical question in the whole matter is whether an assignee's action on the covenant is local or transitory. The sub-commentator to Williams concludes that as the action is given by the statute it need not be local, 1 Wm. Saund., p. 241, note; and see *Thrale v. Cornwall*, 1 Wils. 165; *Webb v. Russell*, 3 T. R. 393; *Isherwood v. Oldenow*, 3 M. & Sel. 396. But however sound that may be, the notion that has generally gotten hold is that the action is based on privity of estate, and is probably local in most jurisdictions; and so in America generally in states where covenants run with a fee. 1 Smith's Leading Cases, 8th ed., p. 235; Sugden, Vend. and Pur., 14th ed., p. 583; *Barker v. Damon*, 3 Mod. 377; *Walker's Case*, 3 Co. 22b, (semble); *Salisbury v. Shirley*, 66 Cal. 223; *Bonetti v. Treat*, 91 Cal. 223; *Peers v. Consol. Coal Co.*, 166 Ill. 361; *Hintz v. Thomas*, 7 Md. 346; *Donelson v. Polk*, 64 Md. 501; *Patty v. Bogle*, 59 Miss. 491; *St. Louis Pub. School v. Boatman Ins. Co.*, 5 Mo. App. 91; *Guinzburg v. Claude*, 28 Mo. App. 258; *Childs v. Clark*, 3 Barb., Ch. 52; but compare *Marshall v. Lippman*, 16 Hun. 110; *Nesbit v. Nesbit*, Taylor (Nor. Car.) 82 (semble);

Morgan v. Yard, 12 W. N. C. 449; Drake v. Lacoe, 157 Pa. 17 (semble); Bowdre v. Hampton, 6 Rich. 208, 223. In Worley v. Hineman, 6 Ind. App. 240, 248, and Univ. of Vt. v. Joslyn, 21 Vt. 52, the action is made transitory by statute.

In Wheeler v. Schad, 7 Nev. 204, it appears that an action on a covenant in a grant need not be local.

In Isherwood v. Oldenow, Lord Ellenborough suggested that however the question might be argued in the matter of covenants in grants, a lease, even from remote times, was only a contract of which an entry was the consummation; and locality could have nothing to do with any rights arising on a purely contractual relation. This would seem evidently the root of the matter, except that there is no ground even for a distinction between leases and grants. We have seen that warranty was really nothing but a contract, and while under the feudal law it became an incident to the holding of every estate, the express warranty in terms extended or limited the running at the will of the parties. Privity of estate served merely to indicate who were meant to be included under the designation "heirs" or "assigns" to take advantage of the contract. True enough, to get the real advantage of the old warranty in the judgment that the voucher have other lands, the vouching to warranty must have had a local nature, as only a local court could carry out a judgment to give the voucher other lands; but so far as giving damages are concerned, that the action be brought at the place where the land lies is as unnecessary as in case of any other action on a contract. Further evidence that the assignee's obligation is distinctly contractual may be deduced from the holding that where the lease contains an express covenant the assignee even cannot be sued on an implied contract for use and occupation. Glover v. Wilson, 2 Barb. 264; Marney v. Byrd, 11 Hump. 95.

It is perhaps unnecessary to point out that the weight of American decisions that action on the covenant is local should

constitute no decisive reason for continuing such law, as the real question is the proper forum for an action of contract, and not the locality for any peculiar real proceedings.

One difficulty arises with the idea that actions depend entirely on the contract assumed and that assignees sue by virtue of being specified and not by their owning the land. So long as the assign is intended to take, the action may not be local; but how about involuntary assignees—purchasers at sale under mortgage, tax sales, and executions at law? That such purchasers are in by privity of estate there is no doubt, for the law professes to sell the debtor's title and right and no other. But are they assigns within the meaning of the original covenantor when he agreed to be liable to assigns? Did not assigns mean voluntary assigns? We know that the law is very particular in other branches to restrain the benefits or consequences of conditions where they were not voluntarily granted. Witness the law of restraints and forfeitures upon alienation of property. But there is universal acceptance of the notion that such vendees have all the rights of the contract. *Hayes v. N. Y. Gold Mining Co.*, 2 Col. 273; *White v. Whitney*, 3 Met. (Mass.), 81 (by statute); *Ely v. Hergesell*, 46 Mich. 325; *Kearney v. Post*, 1 Sanford, 105; *Andrews v. Walcott*, 16 Barb. 21; *Mygatt v. Coe*, 142 N. Y. 78; *Simons v. VanIngen*, 86 Pa. 330; *Williams v. Baugh*, 9 Lea 455; *Re Huddell*, 16 Fed. Rep. 373; several of the cases being covenants for title in fees, though the point is the same.

So far as leases are concerned it may be said that the wording of the statute is enough to cover all assigns, and so they may be included in the rights; but it is hardly necessary to remind the reader that the notion of an involuntary assignee was entirely unknown to the framers of the Statute of 32 H. VIII, as mortgage or execution sales were creatures of the later law, and the remedies by early statutes merely gave possession of the lands to hold for the profits until debts were paid.



It is surprising that the notion that actions rest upon privacy of estate should have gained such hold in the light of the parallel cases of leases not under seal. It is well settled that the statute does not cover such leases. *Glover v. Cope*, 3 Lev. 326; *Selwyn's Nisi Prius.*, Cov. V., p. 441, 13th ed.; *Parke B. in Buckworth v. Simpson*, 1 C. M. & R. 834; assumption of counsel in *Bridges v. Lewis*, 3 Q. B. 603; *Standen v. Christmas*, 10 Q. B. 135; *Bickford v. Parsons*, 5 C. B. 920; *I Smith's Leading Cases*, 9th ed., note to *Spencer's Case*; *Sheets v. Selden*, 1 Wall. 177; *Kennedy v. Owen*, 136 Mass. 199.

Rights and obligations contained in these leases therefore can be enforced by assignees only as in assignments of any other chose in action—by suit in the name of the original parties. *Bickford v. Parsons* (*supra*); and see *I Smith's Lead. Cas.*, 9th ed., p. 181. For enforcing that right there has never been any suggestion that locality must be observed.

The parallel law of leases not under seal has been extended in a very interesting way, involving some quite difficult questions. While it was clear enough that personal contracts or obligations could be enforced only in the name of the original parties, it was realized that the main rights of landlords were in no way dependent upon such recourses. The chief claim upon the tenant—the claim for rent—and the right to distrain for it, were not personal claims; and distraint would always enable the reversioner to get his rent, subject only to the necessity of a suit in replevin if the tenant denied his right. Moreover, by the Statute 11 Geo. II, c. 19, sec. 14, attornment by the tenant was done away with; and after that an action of debt was admitted to lie. Per Lord Denman in *Standen v. Christmas*, 10 Q. B. 136. But when the assignee sought to bring assumpsit for use and occupation a contract was to be implied and further invention became necessary, for the Common Law thoroughly observes the maxim that no contract can be implied where

another clearly exists, and in these cases there existed the lease contract between the assignor and the lessee.

But as the point generally arose on an ordinary lease in writing from which the seal had been omitted, it was said that the lessor having named his assigns, intended them to have the benefit of the contract and contracted for them as well as for himself. On this ground such an action was allowed in the assignee's name. *Standen v. Christmas*, 10 Q. B. 135; Cf. *Elliott v. Johnson*, L. R. 2 Q. B. 120. But does not the theory prove too much? The lessor must contract as agent of a future assignee, and the assignee must ratify either when he sues for use and occupation or before that time. That is to say, the conception is a double contract, one between the lessee and the lessor for himself, and another between the lessee and the lessor as agent for an indicated possible assignee. But though such a state of affairs is conceivable, it may be asked, if the lessor can be agent to contract for use and occupation by the tenant, why can he not contract as agent for those other agreements in the lease, as repairing, etc., which Lord Denman expressly confined to covenants and thought enforceable by those assignees only who are covered by the statute? It would seem evident, on the whole, that no such agency was intended.

In certain of the United States which recognize the right of a beneficiary under a contract to sue in his own name at law, the matter might be more easily handled. If the lessor be taken to have covenanted with the lessee to do certain things for the lessor himself as well as for the lessor's assign, it might indeed be argued that though the formal lease continued, the assignee of the lessor might enforce the agreement. Such an application of the doctrine would be novel, however, and it would be probably very limited in its operation, perhaps being confined to the payment of rent or agreements to do certain specific things. As the right of beneficiaries to sue at law on contracts is not recognized in England, such

was not the meaning of Lord Denman in *Standen v. Christmas*.

It is hardly within the province of this essay to discuss how the assignment of the reversion should carry with it the right to sue in the name of the assignor for benefits of contracts made with him personally. Such a question belongs rather to the study of the relation between landlord and tenant.

But though no new contract can be implied between the assignee of the reversion and the lessee while the former contract of occupation between the assignor and the lessee still continues, yet presumptions can be made very naturally at the termination of the prior contract of lease. So where the leases are short, and a new landlord has come in, there is no difficulty in presuming a renewal of the same contract though between different parties. This was done in *Buckworth v. Simpson*, 1 C. M. & R. 834. And comparison may be made with *Lumby v. Hodgson*, 16 East, 99.

In *Cornish v. Stubbs*, L. R., 5 C. P. 334, a landlord had leased by parole with right to discontinue on a week's notice. The lease gave the tenant certain licenses. The lessor having died, the plaintiff, his son, accepted the regular rent. The court held that there was an implied continuance of the former lease with its privileges, one of which was a reasonable time for the tenant to remove his effects. Mr. Justice Willes held that it was a contract right annexed to the land, as the law annexed such rights to tenures at will and for life. This uncertain doctrine was disregarded, however, in *Smith v. Eggleston*, L. R., 9 C. P. 145, and it was made a question for the jury whether the old lease was affirmed by the new lessor. It is needless to remark the soundness of this last view of the situation.

But whatever difficulty may be encountered in the explanation of the running of benefits in parole leases, in the carrying of burdens, it is believed no difficulty is encountered.

In *Mansel v. Norton*, 22 Ch. D. 769, one M., possessed of lands in fee, prepared a lease for seven years with covenants to pay for all the tenant's property to be found on the farm at the end of the lease. The lease was never executed, and so the holding was by parole. M. died, willing another term for one thousand years in trust, and subject to the terms willed the farm to the plaintiff for life. The plaintiff entered, and at the end of the seven years' term paid the tenant for the property on the land and brought his bill to recover the amount from the estate of M. The court, Sir George Jessel, held that the obligation to pay for the tenant's property was one running with the land and that the plaintiff as owner of the land was primarily responsible and could not recover.

This decision, better than any other, brings out the fact that the gist of the matter of the running of agreements is the relation of principal and surety. If the covenant was one intended to run with the land, the land was to be ultimately liable, into whose hands soever it should come. An assignee was expected to take it, benefits and burdens alike. The plaintiff, therefore, having assumed what it was contemplated that he should assume, had no right to recover against the personal representative who took the place of the former owner as mere surety of the carrying out of the agreement. Of course it was immaterial whether the lease was under seal or merely parole.<sup>1</sup>

The principle will come out more clearly in a discussion of parties to actions and their respective rights. So without

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<sup>1</sup> In saying that between the parties the land is regarded as ultimately liable, it is not to be understood that the covenant binds the land itself like an easement, affecting the possessor, however he come into title. Such an idea of covenants was repudiated in Chapter III. All that is meant here is that parties legally assigning the land among themselves usually consider that the burden of an agreement is to be met by the proceeds or general value of the land; and that the land presumably cost the owner more or less in consideration of the obligation attached to it.

stopping to examine how far the courts would have entertained a bill by the representative against this devisee for the value of the tenant's property had the devisee refused to pay and the representative paid the tenant, let us proceed at once to consider the parties to actions in the ordinary case of leases under seal.

For convenience let the parties be taken up in their order with regard to both benefits and burdens.

So long as the lessor remains in possession of the reversion his rights or liabilities are of little importance, as it is but a matter of contract. But after he has assigned the reversion and his assignee has gained full rights, whether by the statute of 32 H. VIII, or otherwise, it becomes important to know whether the lessor's obligations and rights still continue. His rights must continue at least in name, as the covenant was distinctly with him, *I Wm. Saund., Thursby v. Plant*, note, p. 241 (but see *Stoddard v. Emery*, 128 Pa. 436, *contra*, which is not to be sustained); but whether the lessor can recover nominal damages or full damages the courts seem not to have decided. If the breach by the lessee occurred during the lessor's ownership of the reversion there would seem no reason why the lessor's damages should not be full, as the assignee can recover for those breaches only which occur after he receives assignment (see the same citation); but for breaches after the lessor has assigned, nominal damages should be all he should recover, as full damages would be held in trust for his assignee and the assignee can sue the delinquent for himself and does not need the assignor to sue for him. The lessor's duties, however, must continue full, and he must trust to his right against his assignee to recoup for any outlay to which he is subjected after the assignment.

While the courts seem to have had little occasion to consider the lessor's burdens continuing after he has assigned, they have had much to say about the lessee's burdens continu-

ing after he has assigned; and it is believed that the point is the same. On the other hand the lessee's continuing benefits have met with a noticeable lack of consideration, so that any rights he may have after he has assigned his term may be passed over as similar to those of the lessor after he has assigned the reversion. The assignment of the term would not destroy the original lessee's right to sue for covenants subsequently broken, though it would seem to carry with it to the assignee a complete legal right to sue at law for covenants broken during his holding. Then the original lessee would be compelled to hold in trust for his assignees anything he might receive on breaches after assignment, while at the same time the assignee would have his action at law, although he would be allowed full satisfaction but once.<sup>1</sup>

If the lessee was not obliged to pay over to the assignee any money thus received, then this would mean that the covenantor's payment to the lessee would be no defence to the assignee's demand. In England this might frequently happen, although with us the records would give the covenantor ample notice of the assignment. In *Cronin v. Watkins*, 1 Tenn. Ch. 119, it was held that a covenantor who has paid the lessee without notice of the assignment is not liable to the assignee, as the registration could give no notice that a merely personal obligation of the lessor had been shifted to the assignee. But the suit was in equity, and in the assignor's name, it being held that the covenant did not run at law without the mentioning of assigns, and it might possibly be held that registration is no notice of the transfer of a covenant which cannot be recognized as transferred at law.

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<sup>1</sup> This principle is evident from the decision in *Friery etc. Breweries v. Singleton* [1899], 1 Ch. 86. There a lessee for years had agreed to assign his lease and the prospective assignee had entered and had even paid some of the rents to the lessor. But when the prospective assignee sought, in his own name, to enforce the lessor's covenant in the lease, the court held that this plaintiff was not the person to enforce the covenant, he not being the legal owner of the lease. The lessee himself still had the right.

Now, as to the lessee's burdens continuing after assignment. While the lessee's right to the possession under a lease for years is merely a contract, so that it is a little more confusing to speak of this right to possession as being primarily burdened by the lessee's covenant as the freehold in land may be said to be burdened by the lessor's covenants; yet when a lessee assigns his right he assigns something which can be readily conceived as carrying burdens and benefits, as well as a reversion; and as the possessor of the lease is the one to be primarily liable, the relation of principal and surety is the same. It will be seen that the decisions fully sustain this position. Thus after the lessee assigns his term he is of course still liable to the reversioner on the covenants. *Bachelour and Gage's Case*, Cro. Car. 188; *Scott v. Lunt*, 7 Peters 596; *Coburn v. Goodall*, 72 Cal. 498; *Bonetti v. Treat*, 91 Cal. 253; *Wilson v. Gerhardt*, 9 Col. 585; *Consolidated Coal Co. v. Peers*, 39 Ill. App. 453; same case, 59 Ill. App. 595, 166 Ill. 361; *Fletcher v. McFarlane*, 12 Mass. 431; *Pfaff v. Golden*, 126 Mass. 402; *Deane v. Caldwell*, 127 Mass. 242; *Greenleaf v. Allen*, 127 Mass. 248; *Wineman v. Philips*, 93 Mich. 223; *Patty v. Bogle*, 59 Miss. 491; *Hendrix v. Dickson*, 69 Mo. App. 197; *Bouscaren v. Brown*, 40 Neb. 422; *Hunt v. Gardine*, 53 N. J. L. 530; *Smith v. Harrison*, 42 O. St. 180; *Kunckle v. Wynick*, 1 Dall. 326; *Dewey v. Dupuy*, 2 W. & S. 553; *Ranger v. Bacon*, 22 N. Y. Supp. 551; *Almy v. Greene*, 13 R. I. 350; *Shaw v. Partridge*, 17 Vt. 626. Nor is he any less liable because the lessor has accepted rent from the assignee, which he had done in *Bachelour and Gage's Case* and in several of the American Cases just cited. See also *Damb v. Hoffman*, 3 E. D. Smith 361; *Wall v. Hinds*, 4 Gray 256; *Craveling v. DeHart*, 54 N. J. L. 338.<sup>1</sup> But if the lessee be required

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<sup>1</sup> Of course the lessor can have but one satisfaction of the covenant, *Whetstone v. McCartney*, 32 Mo. App. 430. It is often said that the lessee is not liable after assignment on implied covenants,

to sustain the full obligation after assigning the term, it is said that there is an implied covenant by the assigns to indemnify him. *Burnett v. Lynch*, 5 B. & C. 589; *Wolveridge v. Steward*, 1 Cr. & M. 644; *Humble v. Langston*, 7 M. & W. 517; *Moule v. Garrett*, L. R., 5 Ex. 132, L. R., 7 Ex. 101; *Brinkley v. Hamberley*, 67 Md. 169.

The judges have distinctly called this the implied contract of suretyship. Thus Baron Parke said in *Humble v. Langston*, "The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, and the lessee is also liable in the nature of a surety as between himself and the assignee for the performance of the same covenants." And Lord Denman in *Wolveridge v. Steward* thus worded it fully: "The effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who as between himself and the lessor, is the principal, bound, whilst he is assignee to pay the rent,—and the surety after paying the debt, or discharging the obligation to which he is liable has this remedy over against the principal."<sup>1</sup>

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e. g. *Charless v. Froebel*, 47 Mo. App. 45. It is evident that this is but another way of saying that there is no longer any covenant at all. The covenant is implied from the fact that the lessee is in possession of the premises, and if there has been a complete assignment, there is no longer any reason to imply a contract between the lessor and the former lessee. This is set forth with great clearness in *Consumers' Ice Co. v. Bixter*, 84 Md. 437.

What is an implied covenant should not be a matter of doubt. It is drawn from acts, not from writings. Any expression of the parties indicating that a covenant was intended, would seem in nature an express covenant. So *Kimpton v. Walker*, 9 Vt. 191, that "yielding and paying" makes an implied covenant seems hardly to be sustained.

<sup>1</sup> In *Moule v. Garrett*, L. R. 7, Ex. 101, in the Exchequer Chamber, Mr. Justice Willes expressed the same principle in broader language, as follows: "I am of the same opinion, on the ground that where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the



The liability of the lessee after the term has been assigned is confined, however, to action of covenant. Thus the action of debt, not being a purely contractual claim, after the lessee has assigned the term and the assignee has once paid rent to the lessor, the lessee is no longer liable to the lessor for the rent in an action of debt. *Walker's Case*, 3 Co. Rep. 24 a. b.; *Marsh v. Brace*, Cro. Jac. 334; *Thursby v. Plant*, 1 Wm. Saund. 240.

Coming now to the rights and liabilities of assignees, it should be remembered first of all, both with regard to assignees of the term and assignees of the reversion, that they are concerned only with those breaches of covenants which occur during the continuance of their legal proprietary right to the estate. Not being parties to the original covenant, when they have assigned over their holdings such assignees are no more concerned with subsequent breaches than they were with breaches occurring before they received assignment. *Bailey v. Richardson*, 66 Cal. 416; *Scheidt v. Betz*, 4 Ill. App. 431; *Allen v. Wooley*, 1 Blkf. 149; *Hintz v. Thomas*, 7 Md. 346; *Donaldson v. Polk*, 64 Md. 501; *Mason v. Smith*, 131 Mass. 510; *Lee v. Payne*, 4 Mich. 106; *St. Louis Pub. Schools v. Boatman Ins. Co.*, 5 Mo. App. 91; *Kane v. Sanger*, 14 Johns. 89; *Glover v. Wilson*, 2 Barb. 254; *Childs v. Clark*, 3 Barb. Ch. 52; *Armstrong v. Wheeler*, 9 Cōw. 88; *Gerzebeck v. Lord*, 33 N. J. L. 240; *Washn. Gas. Co. v. Johnson*, 123 Pa. 576; *Keith v. Day*, 15 Vt.

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contract is taken by the defendant; the former is entitled to be indemnified by the latter in respect of the performance of the obligation." The notion that the land is the principal obligor was also indorsed in *Carley v. Lewis*, 24 Ind. 23.

Where the assignee of the lessee has sublet, however, the sublessee is not a principal to the original lessee; there is no privity of contract between them, and he is not liable at law to the lessee who has paid the rent. See *Bonner v. Tottenham etc. Society* [1899], 1 Q. B. 161. Of course the explanation is that the sublessee is not the holder of the land so far as the original lessee is concerned. The sublessee merely holds possession for the lessee's assignee.

660; and see 1 Sm. Lead. Cas., 8th Am. ed., 211. By a statute in Pennsylvania the assignee of a lease subject to a ground rent is made liable for rent due before he accepts assignment, but he is not liable for interest on that sum. *McQuesney v. Hiester*, 33 Pa. 435.

But very nice questions may arise as to what constitutes an assignment. Thus where the alleged assignment imposed different covenants or exacted a different rent from the original lease it has been held, it would seem properly, that there was no assignment, but a mere sub-letting, and the assignee was not liable to the original lessor. *Collemer v. Kelley*, 12 Ia. 319; *Shumway v. Collins*, 6 Gray 227; *Dunlap v. Bulard*, 131 Mass. 161; *McNeil v. Kendall*, 128 Mass. 245; *Drake v. LaCoe*, 157 Pa. 17; *Martin v. O'Connor*, 43 Barb. 514. But apparently in *Palmer v. Edwards*, 1 Doug. 187, note, and in *Beardman v. Wilson, L. R.*, 4 Co. P. 57; *Smiley v. VanWinkle*, 6 Cal. 605; *Stewart v. Ry.*, 102 N. Y. 601; *Craig v. Summers*, 47 Minn. 189; and *St. Joseph Ry. v. St. Louis Ry.*, 135 Mo. 173, the contrary conclusion was reached, based on the idea stated by Coke that there cannot be a sub-lease unless there is something of a reversion left in the sub-lessor. As a lease for years is in principle a contract, however, it is difficult to see how it can be assigned otherwise than in its completeness; so that any change in the obligation would be making a new contract. But text writers have indorsed Coke's view. 1 Woodfall, *Landlord and Tenant*, 258; Taylor, *idem*, sec. 16.

Some question has arisen, too, as to what constitutes an assignment of the reversion. Thus the assignment of the rent for a lease is not considered an assignment of the reversion, and covenants do not run with it. *Demarest v. Wilard*, 8 Cowen 206. This is, of course, thoroughly scund, if the assignor reserved the other rights against the tenant, as waste or anything that would indicate that as lessor he was still interested in the property. The only difficulty that

could arise would be in determining whether a certain artificial writing was intended to assign the whole reversion or the rent only. That would be but a matter of interpretation in each case.

While the assignee is concerned with liabilities only which arose during his holding, yet a curious line of cases is to be found upon the liability of the assignee for breaches which occurred during his holding, but for which he is sued after assigning over his interest in the term. There would seem to be no reason why he should not be liable in an ordinary action at law. As the breach of the contract obligation had given rise to a legal duty to pay money, it would seem immaterial that the relation had so changed that he could be subjected no longer to a new liability. It has been shown that the legal obligation was personal; and this particular duty has never been transferred to another. In England the liability is legal, *Harley v. King*, 2 C., M. and R. 18; and a dictum may be found to the same effect in *Quackenboss v. Clarke*, 12 Wend. 555, 557; but in Maryland it was early held that the liability was one enforceable only in equity, *Hintze v. Thomas*, 7 Md. 346; and this case has since been followed in that state until it has become acknowledged law, though its soundness is now questioned even by the Maryland Court itself. *Mayhew v. Hardesty*, 8 Md. 479; *Lester v. Hardesty*, 29 Md. 50; *Donelson v. Polk*, 64 Md. 501.

The origin of the Maryland doctrine is attributed in part to a supposed statement of Baron Alderson, while sitting in equity in *Fagg v. Dobie*, 3 Y. & C. 96, that the action could not be maintained at law, and in part to the unquestionable right to maintain the suit in equity if the right did not exist at law. *City of London v. Richmond*, 2 Vern., 421; *Philpot v. Hoare*, Ambler, 480; *Valliant v. Dodemede*, 2 Atk. 546. But it is submitted that Baron Alderson did not make so broad a statement, for *Fagg v. Dobie* involved a very

different principle. The question there was whether an assignment over of a term to a beggar would relieve from responsibility on the lease, and Baron Alderson thought that such an assignment, if not fraudulent, would relieve from responsibility, but added that for actions already accrued, equity would relieve. While the implication made by the Maryland Court is not violent, it will be noted that Baron Alderson's statement really amounted to saying that if the right against the action was lost under those circumstances equity would relieve against such injustice.<sup>1</sup>

It is not to be expected, however, that any other jurisdiction will intelligently follow Maryland in its holding; so its existence in that state is not of general concern.

It is by no means infrequent that one of the parties to a lease, instead of assigning the whole of the interest he may possess, as in the former cases, assigns but a part of it; and in certain sorts of such assignments covenants which are separable in their effect may be carried to the assignees in the same way as if all the interest had been assigned. By observation it will appear that these partial assignments may be of several kinds. The lessee may assign part of his holding for all the remainder of the term, or he may assign all or part of the holding for part of the term. So the lessor may assign all the reversion in part of the land, or part of the reversion in all or part of the land.

In the first of these, where the lessee assigns part of the holding for all the remainder of the term, the covenants may run. *Palmer v. Edwards*, 1 Doug. 187; *Congham v. King*, Cro. Car. 221; *Simpson v. Clayton*, 4 Bing. N. C. 758, 780; *Harris v. Frank*, 52 Miss. 155; *Main v. Davis*, 32 Barb. 461; *Dartmouth College v. Clough*, 8 New H. 22; *Lansford v. Alexander*, 4 Dev. & Bat. 40. So in the third case where the lessor assigns all the reversion in part of the land cove-

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<sup>1</sup> For the discussion of the ability thus to avoid liability see post, p. 182, and note.

nants may run. *Twynam v. Pickard*, 2 B. & Ald. 105; *Pike v. Leiter*, 127 Ill. 287. And likewise in the fourth case, where the lessor assigns part of the reversion in all the land the covenants may run; and so it would seem, even though the reversion is assigned for years only. *Co. Lit.* 215a; *Attoe v. Hemmings*, 2 Bulst. 281; *Wright v. Burroughs*, 4 D. & L. 438, same case, 3 C. B. 685.

In the second case, however, where the lessee assigns all or part of the holding for only part of the term, the covenants do not run, for the assignment in this case is a mere subletting. *Halford v. Hatch*, 1 Doug. 183; *Camp v. Scott*, 47 Conn. 366, 377; *Mayhew v. Hardesty*, 8 Md. 479; *Lee v. Payne*, 4 Mich. 106; *Dartmouth College v. Clough*, 8 N. H. 22; *Quackenboss v. Clark*, 12 Wend. 555; *Jennings v. Alexander*, 1 Hilton 154; *May v. Sheehy*, 4 Cranch C. C. 135; *Harvey v. McGrew*, 44 Texas 412. And in *Quackenboss v. Clark* the court went so far as to hold that the lease must be assigned in form, it would seem, even though the whole remainder of the term be assigned; for possession they regarded as merely *prima facie* proof of assignment.<sup>1</sup> The reasons for all these distinctions will appear clearly from the sequel.

It is worthy of especial note that in assignments of the reversion, assignments for years carry the assumption of covenants as though the land were assigned. The possessor of a long term may sublet a part of it with covenants, and then assign his whole interest in the term, as in *Vernon v. Smith*, 5 B. & Ald. 1; *Pyot v. Lady St. John*, Cro. Jac. 329. Or the owner of land in fee may lease for a term with covenants and then assign the reversion for a longer term, as in some of the cases cited above. The assignee of the residue of the term or the assignee for years of the reversion takes the assignor's present interest in the tenement, and as the

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<sup>1</sup> This exemption of the sublessee as a defendant applies only to actions at law; of course he must be made defendant to a motion for an injunction, as in *Dunn v. Barton*, 16 Fla. 765.

period assigned extends beyond the time of the former lease the benefits and burdens of that are supposed to be conveyed, too, the ordinary instance of benefits being the rents of the former lease.

Such a set of decisions are not necessarily overruled therefore by *Mansel v. Norton*, 22 Ch. D. 729 (stated above). There the assignment of the reversion for a term of one thousand years evidently created only a dry trust, and was not intended to carry the benefits of the seven years' lease existing; so that the reversioner for life was held to the burdens of the seven years' lease, as he probably received the benefits.

On theory, however, it is believed to be difficult to sustain the cases of assignment of the reversioner's rights with a second longer term created by him. For two persons separately to have entire right to the possession of the same land from the same person at the same time, is impossible. And where a greater term is conceived to be granted out of the reversion, this is of course done. At Common Law possession of the second term could not be given without forcible ouster of the first lessee. The notion technically called a surrender in law is based upon the soundness of this proposition. Therefore the granting of the second term can amount only to the grant of a term to begin at the expiration of the existing term plus the assignment of the rent to be gotten from that term. Such a grant, however, would be but the grant of a future interest<sup>1</sup> giving no rights to possession whatever until the lease in question should be done; and this second grantee could gain no right to sue on covenants. *Allen v. Wooley*, 1 Blkf. (Ind.) 149.

It is evident that if privity of estate determines the running of covenants, these covenants could not run, as the second termor has not received the estate which the reversioner had at the time of the first lease. But though it has been explained above that privity of estate is merely a means

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<sup>1</sup> II Bl. Com. 144; Gray, Rule against Perpetuities, sec. '71.

of determining what assigns were intended by the lessor or by the framers of the statute to have the benefit of covenants; the natural conception would be that those are assigns within the meaning of the term who succeed to the lessor's present interest in the estate out of which the first term is carved. If the lease granted were for years, then the lessor has an estate in possession; for the lessee for years is always holding the lessor's possession; and it is the successor to this estate in possession who is to have the benefit and the burden of covenants, as he must succeed to the benefits or burdens of the existence of the lease.

The cases therefore seem clearly anomalous, and if law, indicate merely a bold construction of the Statute of 32 Henry VIII to carry out the intention of the parties at the creation of the second term out of the reversion. There seems to be no decision on the subject in America, and it is to be hoped that the cases will not be followed.

It requires only a hasty glance, on the other hand, to see that cases like *Vernon v. Smith* cause no such difficulty. Where a lessee sublets, by a sort of fiction he is assimilated to the possessor of a freehold. His sublessee holds of him, and his assignee steps into his place and gains all his rights and responsibilities toward the sublessee. The assignor's present interest is gone. Attornment even to the original lessor is dispensed with by statute as we have seen.

It is evident from this reasoning that the difference in the law between partial assignments and subleases in the running of covenants is not based upon convenience or accident, but is fundamental. In a partial assignment of the land held in lease for the whole of the term the land is merely severed into two parts, and there exist two leases, each in possession. While in the case of the sublease, extending over but part of the term, to hold of the original lessor would be to create two terms, only one of which could be in possession, followed by another in futuro, which could not

be existent at all,—a *reductio ad absurdum*. That this is the law with regard to subletting, is evidence of the unsoundness of the line of cases just discussed.

One point more is to be noticed in reference to partial assignments. The covenant running with the severed holding must be a severable covenant, as a covenant to repair, a covenant to insure, a covenant to keep the land in cultivation, or the like. Where the lease contains a covenant to do some one thing or to yield some one benefit the law cannot undertake to decide what proportion must be assumed by each party. Such is a covenant to pay a lump sum of rent. *Walker's Case*, 3 Co. 23. So Lord Coke says the statute does not extend to "covenants for payment of a sum in gross, delivery of corn, wood or the like." Co. Lit. 215b. It is easy to see also how the law of conditions in leases was worked out in the same way, making, however, the converse of the former case. The Statute of 32 Henry VIII had declared that conditions should pass to assignees of reversions the same way as covenants. But a condition the law regarded very strictly, allowing neither more nor less to be done in enforcing it than was expressly stated. And so when the breach was committed by the lessee there was the right to the lessor, it was conceived, to destroy the whole term only. If, therefore, the lessor had aliened part of the land in fee, he had no right to enter all the land to oust the lessee; and so the condition was destroyed. That seems to have been the ground of *Knight's Case*, 5 Co. 55b; and Mr. Justice Holroyd commenting on it in *Twynam v. Pickard*, 2 B. & Ald. 105, is reported to have said, "It was expressly held that the severance of any part of the reversion destroyed the whole condition (which was entire, and the breach of which gave one entire right of entry into the whole premises on non payment of rent)." But the learned Justice adds, "That being so, the lessor at Common Law would have no right, in



such a case, to vacate the lease by entry, and consequently his assignee would not have that right under the Statute."

It is hardly necessary to say that Mr. Justice Holroyd's addition is unsound, as the right of entry does not pass to the assignee after the assignment, but all rights that the lessor had before the assignment, passed to the assignee on the assignment; so the fact that after the assignment the lessor had no right of entry left could have nothing to do with the matter. The conclusion, however, merely shows that the court was not certain of its position; and it would indeed seem that in the whole matter the law has been guilty of inconsistency. The condition in Knight's Case was entry for non-payment of rent, and as rent was a lump sum, not to come out of any particular part of the land, of course it could not be apportioned any more than a covenant. The reason, however, is not satisfactory; conditions are construed strictly for the benefit of him in possession, and the condition must clearly have occurred. But when the condition has occurred, that is no reason why the lessor should have to turn the lessee out of all the land, if he chooses to turn him out of a part only. And so if the condition had been the maintaining of certain repairs on particular parts of the land, that is to say, if the undertaking had been severable so as to apply definitely to each part of the land, the reasoning of Knight's Case would not have been sufficient to show that the lessor might not turn the lessee out of one part, and the assignee have turned him out or have left him in the other part. The trouble would seem deeper rooted than that. The true reason going through the whole question is that a lease is an entire contract, giving rise to a whole term, and that term cannot be severed into anything else so long as it exists at all. The moment it is severed, it becomes merely two new terms, and that should require the consent of all parties. Now, whatever be the nature of the undertaking, whether divisible or not, when the breach occurs, he only can enter who has a right to destroy

the whole term. The contract is one contract, and cannot be made two without the lessee's consent. So since the lessor can no longer enforce the contract, nobody can.

This was probably what Lord Coke meant; but this would have caused the later courts no end of trouble. The notion is thoroughgoing. If the lease is one entire contract for conditions, it is one entire contract for covenants; and if that be the case, the assignee of part of the reversion in part of the land cannot sue on covenants to perform severable obligations unless the lessee should consent to the dissolution of the term into two terms. And that was exactly what Mr. Justice Holroyd was preparing to say that the partial assignee could do in that very case of *Twynam v. Pickard*. Of course the confusion would never have arisen if severable and inseverable obligations with condition had been before the court at the time they were considering the practical advantage of severing covenants. But the matter is not of great importance when it is remembered that partial assignments of the covenantor or of the lessee under condition must always amount to giving his consent to the novation; and that will reduce the cases to a great extent.

It is interesting to note that with respect to conditions subletting does not form an exception as it does in the running of covenants. As the sublessee is not recognized as a different person from the lessee, his acts must be the same as those of the lessee himself; so if the condition is broken the lessor's right to enter arises, and the term may be brought to an end. *Wheeler v. Earle*, 5 Cush. 31; *Wertheimer v. Wayne* Circuit Judge, 83 Mich. 56 (semble).

It is perhaps fitting now to consider whether every legal successor of the covenanting parties to leases has the rights and obligations of covenants. It has been seen that at Common Law rights and burdens went only to those who were named. It has been attempted to show that under the liberal reading of the Statute of Leases all requirements of naming

were dispensed with. But it remains to be said that under the influence of Lord Coke, whose master mind has had more to do with framing the later Common Law than any other English Judge, the statute was interpreted to have a much narrower effect. While it was never held after the statute that the heir must be named to be bound by the covenants,<sup>1</sup> it was expressly held that in certain cases the assigns will not be bound without being expressly named. This was decided in *Spencer's Case*, 5 Co. 16a, unquestionably the leading case on covenants in leases. Spencer had leased land for years by deed in which the lessee covenanted for himself, his executors, and administrators that he would build a brick wall about part of the land demised. The lease then by two assignments came to the defendant, and Spencer sued him for a breach of the covenant. The court held that "when the covenant extended to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words; \* \* \* but in the case at bar, the covenant concerns a thing which is not in esse at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being."

No better proof of the idleness of the distinction can be given than that the court proceeded to hold that it was possible to annex the covenant to a thing not in esse if the assigns were included in the covenant. This decision was made forty-two years after the Statute of 32 Henry VIII,

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<sup>1</sup> In 28 H. VIII, Dyer, 14, 69, only four years before the statute, it was held that a covenant by a lessee to build a house runs against executors without being named, but not against heirs. Lord Coke does not notice this, so it could hardly have formed the basis of the reasoning in *Spencer's Case*.

but it seems to have been the origin of the distinction which has become so famous. It cites no authority itself.

This was in 25 Eliz. It had been held already in 3 Eliz. that the word, "assigns," need not be inserted to insure the running of a covenant to repair, Moore 27, without any attention being paid to a further distinction. And in 39 Eliz., *Hyde v. Deane and Canons of Windsor*, Cro. Eliz. 552, it was held generally that covenants running with the land could bind assignees though they were not mentioned, it being added that it did at Common Law, the argument against the decision being based on Y. B. 48 E. III 2, and Dyer 114, that not even the executor could be bound without mention, and 25 H. VIII in *Brooke*, Covenant 32, that the assign must always be named.

There have been doubts even that *Spencer's Case* was really what it is reported to have been by Coke. An anonymous case in 26 Eliz., one year later than the date Coke assigns to *Spencer's Case*, is reported by Moore (Moore 300), which has been taken to report the same proceedings. The arguments on this point, as well as the relative importance of that decision, have been so carefully expressed by the editor of *Smith's Leading Cases* that it would seem best to follow it verbatim.

"The case no doubt bears a strong resemblance to *Spencer's*, but there are good grounds for contending that it is not the same, as well from the difference in the statements of the case as from the fact that *Spencer's Case* was in the Queen's Bench, while that in Moore, as appears from the names of the judges and counsel concerned in it, must have been in the Common Pleas. (See Dugdale, *Orig. Judc.*, 48, *Chronica Series*, 94, 95; *Foss Judges of England*, Vol. 6, p. 158; Moore, 123, pl. 269; 242 pl. 381, Cro. Eliz. 24). Moreover, in reports of cases determined not long after, *Spencer's Case* is cited from Coke and not from Moore (see *Alton v. Hemmings*, 2 Bulst. 281, 12 Jac. 1, before Lord Coke

himself; and *Smith v. Simonds*, Comb. 64, 3 Jac. II). (Nevertheless, as early as 3 W. & M. the two cases seem to have been regarded as the same. See *Glover v. Cope*, 1 Show., at p. 287, where *Spencer's Case* is cited, according to the report, by Row arguendo from Moore, 159). It may also be remarked in reference to the judgment in *Minshull v. Oakes*, so far as it rests on a supposed judgment in *Bally v. Wells*, to the contrary of *Spencer's Case*, that, though such a statement does appear in the report in *Wilson*, it is not to be found in the report of the same case in *Wilmot's Notes of Cases* (see p. 341); and as the opinion of the court was delivered by *Wilmot, C.J.*, himself, this is probably the more accurate report of the two. Indeed the statement in *Wilson* would seem to be a clear mistake, as a little further on the true effect of *Spencer's Case* is cited, and the court are reported to have said: 'We rather chose to adhere to Lord Coke's authority, that such a covenant will not bind the assignee unless he be named.' In *Wilmot's notes of cases*, the point is simply put aside as not necessary to the decision of the case before the court, and no opinion is expressed upon it."

While it seems clear, therefore, that Chief Baron Pollock's discussion in *Minshull v. Oakes*, 2 H. & N. 793, was a little hasty in considering *Spencer's Case* the same, it is by no means clear that he would not have said the same thing notwithstanding his error. If the case in Moore 159 was a different case it was really a decision overruling *Spencer's Case* (though in a different court), as it was clearly decided differently; and the case cited by *Gawdy* must have been a decision before *Spencer's Case*, clearly decided differently. Moreover, as Chief Baron Pollock says, *Smith v. Arnold*, 3 Salk. 4, was directly contrary, and in *Bally v. Wells*, 3 Wils. 25, the contrary is stated. So, though *Grey v. Cuthbertson*, 2 Chitty 282, while a merely blind following of *Spencer's Case*, must have the weight of a decision; it would seem that

the reasoning in *Minshull v. Oakes* indicates what the law in England would be held to-day.

In America, however, the state of the law on this worrisome point has not been worked out so satisfactorily. The American editor to the ninth edition of *Smith's Leading Cases* says the distinction has been generally ignored, vol. 1, p. 208, as has indeed been the case in the instances he mentions. But those courts which pay the most attention to careful consideration of old English decisions, have followed, as might have been feared, the mistakes as well as the wisdom of the great judge whose *dixit* meant more than the law; while in others the distinction in *Spencer's Case* seems to have been followed to the extent of overruling previous decisions in the jurisdiction to the contrary. Some states, too, have settled the question by code or statute. But in any jurisdictions where a statute does not conflict, whether the question has come up or not there would seem no reason to fear that a decision could not be obtained in accord with *Minshull v. Oakes*. The cases are given in the note.<sup>1</sup>

But the decision upon the insertion or omission of "assigns" is not by any means the most important feature of

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<sup>1</sup> In the following jurisdictions the last decision indicated the necessity of including assigns: *Bailey v. Richardson*, 66 Cal. 416, by Statute; *Harris v. Goslin*, 3 Harrington 338 (semble); *Hansen v. Meyer*, 81 Ill. 321; *Conover v. Smith*, 17 N. J. Eq. 57; *Tollman v. Coffin*, 4 N. Y. 134, s. c. 8 N. Y. 465; and see *Johnson v. Bates*, 16 J. & S. 180; *Thompson v. Rose*, 8 Cow. 266; *Brookes v. Smith*, *Thompson Cases* 226; *Bream v. Dickinson*, 2 Hump. 126; *Cronin v. Watkins*, 1 Tenn. Ch. 119; *Hartung v. Witte*, 59 Wis. 285. Cf. *Dorsey v. Ry.*, 58 Ill. 65.

In the following jurisdiction the last decision indicates that assigns need not be named: *Frederick v. Callahan*, 40 Ia. 311 (by Const. of State of Ia.); *Bradford Oil Co. v. Blair*, 113 Pa. 83; *Masury v. Southworth*, 9 O. St. 340.

In *Masury v. Southworth* the court held that the Statute, 32 H. VIII, did not hold in Ohio, but where rights would exist in equity they might be enforced in law in the party's own name. *Petroleum Co. v. Weare*, 44 Ohio St. 604, did not notice this case, but seemed to accept the statute as running in Ohio, and followed *Spencer's Case*.

Spencer's Case. The case is very important as interpreting that the Statute of 32 H. VIII was not intended to change the law in confining the running of covenants to those which touched or concerned the land. The second resolution continues, "But though the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, the assignee shall not be charged." Although the question what touches or concerns the land is not so broad here as it is in considering covenants in general, because the lease and the reversion both cover the same piece of land, yet the question is hardly certain at any view, since it had no certain origin. Any method of determining what covenants concern the land can be no more than choosing some test which covers all or nearly all the decisions. As a prime question there is no way to determine that a covenant concerns the land. It is a question that each judge must decide for himself, just as he decides that a piece of evidence is admissible as logically bearing upon the subject, or that a certain amount of evidence is enough to go to the jury; as he decides that certain actions amount to contempt, or that a particular petitioner is liable to such injury as warrants an injunction; as he decides that a certain act of a legislature is what a reasonable assemblyman might consider due process of law. All these questions may be rendered easier by the holdings of previous judges, but after all they give room for very varying opinions. The Common Law warranty clearly concerned the land and its derivative covenant for title concerns it just as closely, but when that step is passed the trouble begins. Several tests have been suggested by courts in passing upon individual cases, and perhaps one is as much assistance as another. Lord Ellenborough said a covenant would run "if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it." *Congleton v. Pattison*, 10 East

130. Perhaps *Vyvyan v. Arthur*, 1 B. & C. 410, involving a covenant to grind corn on the land at the lessor's mill, would not fall within this test; but it would certainly fall within the negative test given by Mr. Justice Best in *Vernon v. Smith*, 5 B. & Ald. 1, which involved a covenant to keep insurance with which to rebuild a house: "A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned." This test the learned justice applied again in *Vyvyan v. Arthur*. On the other hand, *Thomas v. Hayward*, L. R. 4 Ex. 311, would seem to have been within both the tests and yet the covenant by the lessor not to build another spirit shop within a half mile of the demised premises, was held to run to an assignee of the lessee. As the only guide, therefore, can be the decisions, the following collection of covenants which have been held capable of running has been inserted for convenience in reference:

A covenant for renewal of the lease, *Doe v. Bettison*, 12 East 305; *Piggot v. Mason*, 1 Paige 412; *Pike v. Leiter*, 127 Ill. 287; *Blackmore v. Boardman*, 28 Mo. 420; *Leppla v. Mackey*, 31 Minn. 75; *Wilkinson v. Pettit*, 47 Barb. 230; a covenant to cancel the lease on notice, *Roe v. Hayley*, 12 East 464; a covenant to repair, *Spencer's Case*, 5 Co. 16a; *Roe v. Dean of Windsor*, 5 Coke 24; *Hayes v. N. Y. Mining Co.*, 2 Col. 74; *Williams v. Earle*, L. R., 3 Q. B. 739; *Pollard v. Shaffer*, 1 Dal. 230; *Crawford v. Wetherbee*, 77 Wisc. 419; *Myers v. Burns*, 33 Barb. 401; a covenant to leave the possession peaceable to lessor and in good repair, *Viner Abr. Cov. K. 19*; *Morgan v. Hardy*, 17 Q. B. D. 770; to repair and renew fixtures and machinery, *Morgan v. Hardy*, 17 Q. B. D. 770; a covenant not to assign without the lessor's consent, *Williams v. Earle*, L. R., 3 Q. B. 739; *West v. Dobb*, L. R., 4 Q. B. 634; *Varley v. Coppard*, L. R., 7 C. P. 505; *McCormick v. Stowell*, 138 Mass. 431; *Shattuck v. Lovejoy*, 8 Gray 204; *Kew v. Trainor*, 150 Ill. 150; *Monro v. Waller*, 28 Ont. 29;



or not to sublet, *Brolasky v. Hood*, 6 Phila. 193. It is interesting to note in connection with the covenant not to assign without the lessor's consent that though the covenant is broken the lease must pass, *Chi. Attachment Co. v. Davis Sewing Machine Co.*, 25 N. E. Rep. 669 (Ill.); whereas if the lease had contained a condition it would have been forfeitable and at an end upon entry by the lessor. *Dumpor's Case*, 4 Coke 119. Therefore, for any breaches of other covenants occurring after this wilful breach the new assignee will be liable, while the assignor, if himself an assignee, will not be. This is discussed in *Williams v. Earle*. Compare, however, *Hynes v. Ecker*, 34 Mo. App. 650, *contra*. In *Chipman v. Emeric*, 5 Cal. 49, and in *Reid v. Weissner & Sons Brewing Co.*, 40 Atl. Rep. 877 (Md.), by an analogy to conditions, it was held that one consent to assignment where there was a covenant against assignment without the lessor's consent would destroy the covenant in future. To avoid this, an ingenious but probably unnecessary arrangement was made in *Lindsley v. Schneide Brewing Co.*, 59 Mo. App. 371, whereby the assignee agreed to carry out the lessee's covenants in consideration that the lessor consented to the alienation. The court properly held that this had the additional effect of making this assignee liable on the covenants even after he had again reassigned, an obligation which he would not have had but for the collateral agreement.

♂ In *Williams v. Earle* the true explanation seems to appear. An action was allowed against the assignee of a lessee for assigning over; but a difference was pointed out between a covenant not to assign and a covenant for heirs and assigns not to assign without assent. The first was never anything but a personal covenant affecting the land only collaterally. ♂

It is evident also that the action for the breach of covenant to assign must therefore be brought after the land has passed away, which is a clear proof that liability on cove-

nants broken before assignment but enforced afterwards is cognizable at law and not necessarily in equity, as was held by the cases from Maryland discussed above. *Kew v. Trainor*, 150 Ill. 150; *Monro v. Waller*, 28 Ont. 29.

A condition has been held to run which provides that the land be as well stocked with game on its relinquishment as at the beginning of the lease, *Hooper v. Clark*, L. R. 2 Q. B. 200; a covenant runs to discharge the lessor from all ordinary or extraordinary burdens, *Doe v. Dean of Windsor*, 5 Co. 25; not to plow part of lands leased, *Cockson v. Cock*, Cro. Jac. 125; to reside on the premises, *Tatem v. Chaplin*, 2 H. Bl. 133; a covenant to revalue the lease at periods, *Young v. Wrightson*, 24 Weekly Law Bul. 457; a covenant not to carry on a particular trade, *Congleton v. Patteson*, 10 East 136; *Wertheimer v. Wayne Circuit Judge*, 83 Mich. 56; *Steis v. Kranz*, 32 Minn. 313; a covenant to maintain the insurance on a building where by statute the insurance must go to rebuilding, *Vernon v. Smith*, 1 B. & Ald. 1; *Masury v. Southworth*, 9 Ohio St. 340; *Nor. Trust Co. v. Snyder*, 46 U. S. App. 179 and 579; and it has been decided that a covenant to insure will run with the lease where the lessee can apply to rebuilding or give to the lessor at the lessee's election, *Thomas v. Van Kapff*, 6 G. & J. 381; *Mayhew v. Hardesty*, 8 Md. 479. A covenant to grind at the lessor's mill all the grain to be grown on the land will run against a subsequent assignee of the lessee, *Vyvyvan v. Arthur*, 1 B. & C. 415; *Beach v. Barons*, 13 Barb. 305; so a covenant to build a mill adapted to the working of mines on the land, *Easterby v. Sampson*, 9 B. & C. 505. In *Hemingway v. Fernandes*, 13 Sim. 228, the lessee of a colliery covenanted to build a railway over the land in lease and to haul all coal from that mine as well as other mines of the lessee over this railway, paying the lessor at a fixed rate per ton. It was held that the covenant ran notwithstanding it was for carrying coal not dug on the land, though this feature of the

covenant would seem almost as much collateral as the supposition in the second resolution of *Spencer's Case*. A lessee's covenant will run not to do such acts as will in any way cause danger of forfeit of a liquor license to the premises, *Fleetwood v. Hull*, 23 Q. B. D. 35; so a covenant by the lessor to sell the fee to the lessee, *Re Adams & Kensington Vestry*, 24 Ch. D. 199, 27 id. 394; a covenant by lessee not to carry on any business, *Rolls v. Miller*, 27 Ch. D. 71; and a covenant not to carry on a particular trade, *Clements v. Welles*, 1 Eq. 200; *Bishop of St. Albans v. Battersley*, 3 Q. B. D. 359; or a noisome business, *Hall v. Ewin*, 37 Ch. D. 74; so a covenant to pay taxes and assessments which do not include fines upon landlord for breach of duty, *Tidswell v. Whitworth*, L. R. 2 C. P. 326. And see on this subject of covenants to pay taxes and assessments *Jeffrey v. Neale*, L. R. 6 C. P. 240; *Crosse v. Raw*, L. R. 9 Ex. 209; *Hartley v. Hodson*, 4 C. P. D. 367; *Budd v. Marshall*, 5 C. P. D. 481; *Allen v. Dickenson*, 9 Q. B. D. 632; *Wilkinson v. Collier*, 13 Q. B. D. 1; *Aldridge v. Ferne*, 17 Q. B. D. 212; *Smith v. Robinson*, [1893], 2 Q. B. 53; *Torrey v. Wallace*, 3 Cushing 442; *Mason v. Smith*, 131 Mass. 510; *Wills v. Summers*, 45 Minn. 90; *Trask v. Graham*, 47 Minn. 571; *Astor v. Hoyt*, 5 Wend. 603; *Sandwich v. De Silver*, 1 Brown (Pa.) 221; *Love v. Howard*, 6 R. I. 116; *Univ. Soc. v. Providence*, 6 R. I. 235; *Post v. Kearney*, 2 Comst. 394; *Simonds v. Turner*, 120 Mass. 328.

A covenant to retain and preserve the land where the lease was for 999 years was held to run; *Doherty v. Allman*, 3 A. C. 709; so a covenant by the Postmaster General that the Post Office should be kept on the premises, *Wadham v. P. M. Genl.*, L. R. 6 Q. B. 644. In *Morris v. Kennedy*, [1896], 2 Ir. 247, the lessor had covenanted to make a street in front of the premises within one year, and the assignee of the lessee did not get the premises until after that time, so it

was held that the covenant was broken before he got it and no action would lie.

A covenant to supply water will run with the land, *Jourdain v. Wilson*, 4 B. & Ald. 266; *Shaber v. St. Paul Water Co.*, 30 Minn. 179; *Harris v. Goslin*, 3 Harr. 338; a covenant to allow the lessee to use for three years land cleared by him during the tenancy, *Callen v. McDonald*, 72 Ala. 96; a covenant to pull down old chimneys and erect new, *Harris v. Goslin*, 3 Harr. 338; a covenant by the lessor to purchase improvements on the land, *Hunt v. Danforth*, 2 Curtis C. C. 592; *Stockett v. Howard*, 34 Md. 121; *Bayley v. Richardson*, 66 Cal. 416; *Frederick v. Callahan*, 40 Ia. 311; *Lametti v. Anderson*, 6 Cow. 302, 6 Wend. 326. But see contra *Watson v. Gardner*, 119 Ill. 312; *Johnstone v. Bates*, 16 J. & S. 180; *Bream v. Dickerson*, 2 Hump. 126; and compare *Bailie v. Rodway*, 27 Wisc. 172, that it runs with notice. The improvements must be fixtures, however, *Garton v. Gregory*, 3 B. & S. 90.

So always a covenant by the lessee to pay rent, *Salisbury v. Shirley*, 66 Cal. 223; *Allenspach v. Wagner*, 9 Col. 127; *Webster v. Nichols*, 104 Ill. 160; *Pfaff v. Golden*, 126 Mass. 402; *Fennell v. Guffey*, 139 Pa. 341; *State v. Martin*, 14 Lea 92; and a covenant to remove rubbish made by a quarry, *Coppinger v. Armstrong*, 4 Ill. App. 637; and a covenant by a lessee to continue business, *Oil Co. v. Blair*, 113 Pa. 83. But an exclusive privilege of vending merchandise in a town will not run, *Taylor v. Owen*, 2 Blkf. 301; and generally an agreement to pay a note or mortgage will not run, *Dolph v. White*, 12 N. Y. 296, and a covenant not to keep a livery stable within five miles has been held not to run, *Herbert v. Dupaty*, 42 La. Ann. 343.<sup>1</sup>

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<sup>1</sup> It is needless to point out that the statute of 32 H. VIII, would have no operation under the Civil Law in Louisiana. Any running of agreements would have to be on other principles. But it is held in Louisiana that the purchaser of a lease is liable on all the obligations of the lease. *Lehman v. Dreyfus*, 37 La. Ann. 587.

Is it the law, then, that every covenant which thus touches or concerns the land must run with the land? or must the intention of the original contracting parties determine whether it shall run or not? We see that the intention cannot make the covenant run where it does not touch or concern the land. This is embraced in the decisions in England, and has been expressly decided in America, *Gibson v. Holden*, 115 Ill. 199. Any other law would be a direct denial of the privity of contract, as it would furnish an easy pretext to avoid it.

It is certain, moreover, that the contract of assignment cannot determine the running of the covenants by means of the amount paid for the property, as the covenantor after his obligation has been created cannot have it extended by the contracts of others. Indeed it sometimes occurs that though the contract of assignment contain no reference to the covenant, an assignee can sue on covenants in the original instrument. But while intention may not be able to procure the running of a covenant, should the running attach as an effect to every covenant of the character which concerns the land, the intent merely operating to create a covenant? That is to say, is running with the land an effect which the law attaches willingly or unwillingly to a covenant which benefits or burdens the land? This was of course not the case with the old law of warranty; for the express warranty limited the running as the warrantor intended. But the Statute of 32 H. VIII has dispensed with that requirement, and if the distinction of Lord Coke is dispensed with, the contract must always have that effect. All this would be simple enough but for one decision, and that is that the lessor may expressly limit the liability to himself alone.

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In *Congleton v. Pattison*, 10 East 136, it was held that a covenant to employ only citizens of A would not run, as it does not concern the land—making no difference whether the land is worked by A citizens or B citizens. But compare *White v. Southend Hotel Co.*, [1891], 1 Ch. 767, holding that the benefit and burden of a covenant to sell only wines bought of the lessor will run with the lease.

*Kemp v. Bird*, 5 Ch. D. 549, 974. Of course this is against the statute in allowing the lessor to have rights which are not extended to his assignee, and at once throws the contract back to the intention of the parties.

One other point may cause some difficulty, the right which the covenantee has to release the covenant whenever he chooses, so as to bar those claiming under him. *Littlefield v. Gatchell*, 32 Me. 390; 1 Smith L. C., 8 Am. ed., 234. But it should not be attempted to construe the statute unnaturally; and while the lessee must have had the right to release it, yet at the time of the assignment no such right remained, and that should be all that is required to comply with the statute.

If *Kemp v. Bird* is not to be sustained, then, it may be said that the law only requires that the covenant touch or concern the land, and that in leases, at least, intention has nothing to do with the running of covenants. The statute attaches the running of the covenant as an effect of every assignment of the same estate.<sup>1</sup>

The result of this conclusion must be that the importance of privity of estate is increased, not, however, because privity of estate indicates who might have been meant by the parties in contracting for assigns, but because, regardless of intention, only those in privity of estate can well be called "assigns" within the meaning of the statute, upon which the responsibility of the running has been thrown. But here a line of decisions has broken away, and places the running upon intention again, utterly disregarding the fact that in the particular instances no privity of estate exists. This would seem an anomaly, and must at least be confined to the

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<sup>1</sup> Of course it is always a question of intention whether a given stipulation is a covenant or a condition, *Peers v. Consol. Coal Co.*, 59 Ill. App. 595; but that is a different matter, and can best await discussion in the next chapter. Moreover, the statute, 32 H. VIII, expressly transfers conditions as well as covenants.

cases in which it occurs, namely, remaindermen after life-tenants with the privileges of exercising powers; for it is evident that the decisions are the product of hard cases developing gradually from an innocent beginning.

The first of these cases was *Whitlock's Case*, 8 Co. 69b. *Whitlock* settled his estate by fine on himself for life with a remainder to his son in tail and a remainder over, reserving to himself, however, the power to grant leases. Then he leased for a term to one *Hearn*, reserving rent and taking covenants to himself, his heirs and assigns. The question was whether the remainderman could sue on the covenants, and the court held that the lease being the mere exercise of a power, was created out of the original fine; and the remainderman was but the assignee of the reversion and could maintain the suit. Of course there is nothing anomalous about this.

The next case is *Bery v. White*, *Sir Orlando Bridgman's Judgments*, 82. In this case *Sir Charles Howard*, possessed of a fee, levied a fine to himself for life, remainder to *Robert Howard* for life, remainder to his first and other sons in tail, remainder over, with power to any freeholder to make leases. *C. Howard* and *R. Howard* entered and leased for ninety-nine years, reserving rent to *R. Howard*, his heirs and assigns. *R. Howard* died during the term and his first son, the lessor of the plaintiff, entered and leased. The question was on the legality of *Sir R. Howard's* lease. The court admitted the distinction from *Whitlock's Case*, but said that the lease, though made by a different person from the original fee owner, was nevertheless a part of the original fine and good; that the reservation would have been good if the words, "*R. H., his heirs and assigns*," had been omitted, and their insertion should not vitiate the lease. So the owner of the freehold for the time being should sue just as if the reservation had been by the first owner, as in *Whitlock's Case*. The court also suggested that the words "heirs

and assigns" were general, but it did not rely on this. While, therefore, the method of the court might be very violent in striking out the covenantees and making it a mere open covenant which would fit in anywhere, the operation of the covenant is accomplished without anomaly.

But in the next case of *Hotley v. Scot*, Lofft 316, the anomaly begins. One Astley, seised in the right of his wife of a life estate with power to make present leases, leased for years, reserving rent and with a clause of re-entry to himself, his heirs and assigns. He died, and the remainderman sought to sue, exactly how does not appear. The lease seemed to have been made under the impression that Astley was owner of the fee, and it was so worded. The court, Lord Mansfield, held that "heirs and assigns" was indefinite, and referred to the owner of the reversion. There is no suggestion about the covenant being conceived as being with the owner of the fee, but it was a covenant with Astley on which it was expressed that heirs and assigns of the original owner might sue merely because so intended.

Then comes *Isherwood v. Oldenow*, 3 M. & Sel. 382, which is distinctly a case of covenant. A was seised of a fee and willed to B for life, remainder to C for life, remainder over, with power to any freeholder to make leases. B leased for a term, reserving rent to himself, B and such other person as should be owner of the freehold, and the lessee covenanted with "B, his heirs and assigns," for payment to B or such other person as should be owner of the freehold, to repair, and other covenants. B died and C entered and sued for arrears of rent and for breach of other covenants. The motion was in arrest of judgment for the plaintiff. Lord Ellenborough recited Coke's holding in *Whitlock's Case*, and decided that the lease dated back to the first creation of the power, and then said that reservations in those leases were good, it was not for the court at this time to be holding that the assignee of the original freehold could not



sue on these covenants. "It is too much, therefore, for us at this time of day to pronounce that all which has hitherto been esteemed and done as valid has been error; particularly when we have the text of Lord Coke in *Whitlock's Case* to the same effect. No question was made at the time upon the propriety of those decisions, or of the prolatum of law which we find in them."

How the court failed to grasp the point is hard to see. Certainly they do not seem to have intended to hold that privity of estate is not necessary to the running of the covenant; while in this case it cannot be held that the life-tenant was making a covenant to date back as a covenant with the original grantor. Indeed, that could not be, as he must in that case act as agent of the original grantor; and the agency could not be, as the original grantor was already dead. But Justice LeBlanc said, p. 403: "The argument is that he cannot have this action, because he must be the assignee of the person of the lessor or grantor. But he is the assignee of the person who, in the eye of the law, is the lessor because the person empowering the tenant for life to grant the lease is, in the eye of the law, the lessor. One argument against this mode of considering it has been that the lessee could not maintain covenant against the heirs of the devisor. But I do not think that it is necessary that all the remedies should be mutual as between the assignee of the lessor and the lessee; because mutuality was not so much the object of the statute, as it was to give those persons who at the Common Law were strangers a power to enforce covenants which they had not before." And Justice Bayley said: "This shows that a lease to be made by tenant for life by virtue of such a power entirely originates and takes its essence out of the estate from which the power is derived, and inures as a limitation of the use in pursuance of it. If this be so, then it will follow that the covenants made with the lessee are to pass to every person to whom the person creating the power

has afterwards given any interest. They pass to the first tenant for life, then to the second tenant for life; and the reason is because he has an interest derived not from the first tenant for life, but from the person creating the power."

After this decision *Greenaway v. Hart*, 14 C. B. 340, is not a surprise to us. Estates were limited by indenture to A in trust for the use of B, with power to B to make leases. B leased, reserving rent and with covenants and right of re-entry to "B, his heirs and assigns." The report is very bad, but the situation seems to have been that the court held that the lease was made out of the legal estate by the owner of the equitable estate, B. The plaintiff, then, seems to have been the owner of the legal reversion. The court, Mr. Justice Cresswell, after an elaborate discussion of the cases, concluded thus, "If [B] had been tenant for life of the legal estate, with remainders, there would have been abundant authority for holding that the word 'assigns' meant 'assigns of the settlor' and that a remainderman would have the benefit of the proviso, although neither heir nor assign of [B]. The difficulty arises from the circumstances of his having no legal estate, and therefore the right of re-entry could not for any time be well reserved to him. If, however, the reservation of rent is to be treated as general, and the covenants to pay rent and repair, such as the persons entitled to the reversion may take advantage of, there can be no doubt that the right to re-enter for breach of them was intended to be given to the same persons; and it having been held that the word assigns may be construed to mean the party entitled to the reversion, the power of re-entry may be considered as given to [B], who could not avail himself of it, and to the owner of the reversion, who could: and the plaintiffs, now filling that character, are entitled to recover."

The law is thus practically established in England, but fortunately there seems to be no American decision on the

subject, and it is to be hoped that the English cases will not find a support in other jurisdictions.

On the operation of powers, however, the cases just discussed are sound precedents. Whenever a power is created and its execution accomplished, of course it must relate back and be read into the original instrument, so that the appointee is the lessee of the original creator of the power. So any covenants which this creator had made, or which ran with his seisin, must run to the appointee of the power who could sue or be sued on them. And this of course would be equally true of powers to appoint to uses, as the Statute of Uses would at once operate to transfer the legal estate to the appointee and so make the way easy for the covenants to run. But the question presents itself in these cases how far covenants by the appointor will run to the assigns of the appointee. The question was first raised by Lord St. Leonards, referring especially to covenants for title. Sugden, V. & P., 13 ed., 579. Mr. Sugden there maintained that the appointor's covenant would run, and that even though the appointment be merely that of a use. "It is supposed by some," he says, "that such covenants are merely collateral for want of legal privity. But the purchaser takes the legal fee by the act of the seller—the seller, therefore, cannot be deemed a stranger, if that would be deemed an objection to the covenants attaching—and it is indifferent to this question out of what seisin the use of the purchaser is served, as it becomes a legal estate in his hands, with which the covenants entered into with him in respect of that estate may run. I am not aware of even a plausible argument against this view."

While a covenant for title is the most natural covenant for the appointor to make, there is no reason why it should be confined to that. Any other covenant which would not involve going upon the appointed land, might be made by the appointor. And if the covenant could be made in case of appointing fees, it could be made in appointing leases.

As the appointor is not, however, in any sense a reversioner, it has nothing to do with the Statute of 32 H. VIII. Therefore we must postpone for the present the consideration of the running of the burdens to assignees of any lands of the appointor, and are left to consider whether the benefit of the covenant can run to the assignee of the appointee; that is, whether the covenant can run at all. If it can, the principle is thoroughgoing and it is possible to make a covenant run without the passing of an estate between the original parties. Mr. Sugden says that as an estate passes by the act of the appointor, that is enough. But that depends upon whether a power is more than a mere irrevocable agency. True enough, it survives the creator or quasi-principal, but the estate conveyed is only the estate of the principal.

Compare the case of an escrow, which is a clearer form of agency.<sup>1</sup> An escrow is really the converse of a power. Both survive the creator. Neither the donee of the power nor the escrowee holds the title to the land; while in neither case can subsequent acts of the quasi-principal avoid the creation. In the case of the power the condition of completion is a voluntary act of the intermediary; in the case of the escrow the condition of completion is a voluntary act of the recipient of the estate. In either case the intermediary is by hypothesis a stranger to the grant between the parties. It would hardly be assumed that the escrowee's covenant is anything more than a personal one; yet Mr. Sugden thinks that the donee of the power can make a covenant which will run. But he has no cases sustaining the position, and the Real Property Commissioners doubted it and advised legislation.<sup>2</sup> Indeed, in the only case on the subject, *Roach v. Wadham*, 6 East 289, the notion is almost denied. Mr. Sugden says of the case, "If under a power of appointment in A, a new

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<sup>1</sup> The deed in escrow becomes a valid deed on delivery by the third person after the condition is performed. Cooley's Bl. Com., v. 1, n., p. 535.

<sup>2</sup> Real Property Commission, Third Report, p. 52.

power of appointment be created in B with whom A covenants for title in the usual way, and B afterwards executes his power in favor of C, the covenants will not run with the land in his hands." Sugden, V. & P., 13 ed., p. 580.

In one case, however, there may be more safe support for Mr. Sugden's position, and that is where the powers are general. If the donee could exercise the power in favor of himself, then it might be said that his appointing is only an appointing to himself and a conveyance to his appointee; so that his covenants would run. But it is not believed that that method of reasoning has been employed except in sustaining appointments to persons not within the purview of the power.

Three other subjects present themselves before laying aside the discussion of leases. As they can hardly be said to bear any particular relation to each other, they may be taken up in any succession seeming to recommend itself; so they are presented in what is assumed to be their relative importance.

The first is the relation of covenants in leases to mortgages of the reversion and of the lease. First of the reversion. So far as the English Law is concerned, Lord Denman seems to have expressed it satisfactorily and finally in *Rodgers v. Humphreys*, 4 A. & E. 299. He said: "If there be a lease, and such lease is prior to the mortgage, the mortgagee has the same rights against the lessee and those claiming under him that the mortgagor had, and no other remedy than he had, and his remedy must be on the lease as assignee of the reversion, as long as the lease is in existence, and the tenant acknowledges his title; but if the lease be subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrong-doers, and may bring an ejectment, but he cannot distrain, or bring any action for the rent they have contracted to pay." Compare *Willis v. Eastern Trust and Banking Co.*, 169 U. S. 295.

Of course this presupposes the English doctrine that a mortgage is a passing of the legal title, and with such a law the running of the covenants could not be avoided, although the mortgagor remaining in possession would get the real benefit of many kinds of covenants. In America, however, the law is very much more fair; for the ordinary American law is that a mortgage is but a lien, though it may be difficult to show how such a notion can be sustained upon Common law principles. If the mortgagor still retains the title, then there is no difficulty in holding him to the benefits and burdens, *Trustees & c. v. Streeter*, 64 N. H. 106; while the mortgagee is excluded from both. *Johnson v. Sherman*, 15 Cal. 287; *Davidson v. Cox*, 11 Neb. 250. But see contra *Mygatt v. Coe*, 142 N. Y. 78, that the mortgagee may claim benefits.

If the court of any state must hold that the mortgage passes title, and hence that the covenants pass on to the mortgagee, it may be suggested that the mortgagor in possession may still be reached by the process employed to reach the assignee where the covenantor has been subjected to a judgment on the covenant. The land is always ultimately bound to sustain the liability, and the possessor must save harmless any one whom the law has subjected to a burden. No decision has been presented, however, which involves this notion.

Mortgages of the lease have occasioned a good deal of difficulty, although the law as finally settled develops the same difference between England and America that exists in mortgages of the reversion. As a lease for years is merely a chattel, practically dependent upon the possession, it was at first conceived in England that a mortgage of such a term need not convey the legal title unless the mortgagee assumed possession; so Lord Mansfield in *Eaton v. Jacques*, 2 Doug. 455, held that the burdens of the lessee's covenants would not run to a mortgagee unless in possession. But for the trans-

fer of title to a lease, entry is not necessary, Co. Lit. 46b, and since therefore a mortgagee out of possession might have the legal title, it appeared to later courts that he must have it; so it was later held that he also succeeded to the covenants, and *Williams v. Bosenquet*, 1 B. & B. 238, overruled *Eaton v. Jacques* and established the English Law.

In fact the mortgage of the term usually transfers the title in England, because otherwise the mortgagee would have no security but an equitable charge on the term, not binding on a subsequent purchaser of the term without notice; and for that reason, of course, the mortgagee prefers to have the legal title even though it might be attended with the burdens of covenants. In America, however, the general conception of a mortgage, by the aid of records, gives the mortgagee of the term all his rights as mortgagee without taking the legal title which remains in the mortgagor until the mortgagee takes possession usual upon his acquiring title. Therefore in America a mortgagee of a term out of possession does not get the burdens or benefits of the covenants. *Astor v. Miller*, 2 Paige 68; *Astor v. Hoyt*, 5 Wend. 603; *McMurphy v. Minot*, 4 N. H. 251; *McKee v. Angelrodt*, 16 Mo. 283; *Tallman v. Briscoe*, 65 Barb. 369; *Mygatt v. Coe*, 142 N. Y. 78; *Calvert v. Bradley*, 16 How. 580.<sup>1</sup>

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<sup>1</sup> In *Mygatt v. Coe*, 142 N. Y. 78, Finch, J., for the court, said: "Under the old system which regarded the mortgage as transferring to the mortgagee the entire legal estate, leaving in the mortgagor only an equity which courts of law could not recognize, it was necessary to say and was said that the covenants running with the land followed the legal estate into the hands of the mortgagee, where it remained entire and complete, and the grantees of the equity having no legal estate could have no right to the covenants which already belonged to another. It was so held in *Mayor of Carlisle v. Blamire*, 8 East 487, but the injustice of the doctrine drew upon the ingenuity of equity to supply a remedy, and where the grantee holding covenants had executed a mortgage, and thereafter having been evicted from the premises by a paramount title, his grantor and covenantor settled with the mortgagee by paying the mortgage in full discharge of the covenants, and so assuming to cancel them,

The second problem presented is the application to covenant of the law of title by estoppel. The learned editor of Smith's Leading Cases (notes to Spencer's Case, 8th edition, p. 209), says about this: "When the question arises on the covenants contained in a lease, the peculiar estoppel which exists between landlord and tenant will preclude a denial of the title of the lessor, not only as between the original parties, but where third persons are in question. The law was so held in *Palmer v. Ekins*, 2 Lord Raymond, 1550, which is sustained in the language of Baron Parke in *Goldsworth v. Knights*, 11 M. & W. 337, and *Sturgeon v. Wingfield*, 15 idem 224, although these cases were decided on other

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the grantee was allowed by a decree in equity to sue the covenantor at law, and the latter was restrained from setting up as a defense in any manner the deed or deeds of mortgage which had diverted the covenants from the main line of succession. *Thornton v. Court*, 3 De G. M. & G. 293. By this circuitous route the just result was reached of dividing the benefit of the covenants between mortgagee and owner of the equity of redemption according to their respective rights, and the same just distribution is effected under our system by a different process. We regard the mortgagor as retaining the legal estate, and the mortgagee as having a lien upon it for his security. The covenants, therefore, run to both mortgagee and grantee of mortgagor in proportion to their respective rights, and the covenant is divisible accordingly. A very clear exposition of this doctrine will be found in *White v. Whitney*, 3 Met. 87, and it has been asserted in *Town v. Needham*, 3 Paige 546, and *Andrews v. Wolcott*, 16 Barb. 25."

Finch, J., did not properly state the position of the court in *Thornton v. Court*, however. There, as the report of the case clearly shows, the covenantor went to the mortgagee and by paying him and taking a release, sought to cut out the plaintiff. This the court would not allow, and charged the covenantor with the plaintiff's loss; as but for his act in taking the release the mortgagee would have reconveyed with the benefits to the mortgagor, the plaintiff. It is inexplicable how the learned judge should have misconstrued the court in *Thornton v. Court* to be devising a scheme to avoid the rules of law when it was merely preventing an attempt at fraud. As appears from *Thornton v. Court*, in England the covenants are returned to the mortgagor on his paying the mortgage debt by simply transferring to him the legal title to the lease.



grounds. And the question would seem to have been set at rest in England by the recent decision of *Cuthbertson v. Irving*, 4 H. & N. 742, 757, where the court adopted the rule laid down by Sergeant Williams in the notes to *Walton v. Waterhouse*, 2 Saund. 418, that while the lessee remains in possession under the lease, he cannot set up any defense in the nature of a plea of *nil habuit in tenementis* against the lessor or those claiming under him by assignment, who was said to have as much right to the benefit of the estoppel as if they were parties to the letting, and not merely assigns. There can be no doubt of the wisdom and propriety of this decision, because the estoppel of a lease really grows out of an implied contract that the lessee shall be bound until actually or constructively evicted, whether the lessor is or is not the owner of the land, on the faith of which [contract?] the landlord gives, and the tenant obtains possession, and which would be worth comparatively little if it could not be transferred to a purchaser of the reversion. It was, however, concluded in *Cuthbertson v. Irving* on the authority of *Pargeter v. Harris*, 7 Q. B. 708, that if the true state of the case appeared on the face of the lease, there would be no estoppel, and the lessee would be free to rely on the lessor's want of title as an answer to a suit for the rent."<sup>1</sup>

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<sup>1</sup> That an estoppel runs to assignees of the reversion see *Co. Lit.* 352; 4 *Co.* 53.

It is quite clear that *Whitton v. Peacock*, 2 Bingham N. C. 411, is not a case to the contrary, although Baron Parke's explanation of the case in *Goldsworth v. Knights* (*supra*) may not have been that of the court. The facts, summarized by Baron Parke, are as follows: "A copy-holder devised his estate to another, without surrendering to the use of his will. The devisee of the devisee \* \* \* demised part of the copyhold by deed, and the lessee covenanted to pay rent, and assigned the lease. The heir-at-law of the devisor afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copyhold to the same lessee, and instead of granting a fresh lease to the lessor [lessee?] of the part before demised, took a covenant from him to perform the covenants in that lease. The lessor afterwards surrendered the

Where the reversion by estoppel is assigned after the lease has been made, of course the assignee is bound by the covenants, as good title on receipt by the lessor, would go by first right to the lessee in possession, and the covenants at once being attached would pass on to the person who was assignee of the reversion. *Trevivan v. Lawrence*, 1 Salk. 276. But the difficult case arises where the estoppel is involved in the passing of title to the reversion. Suppose A pretends to sell land to B, and conveys a pretended title, then A receives a good title, and at once leases to C with covenants; is B bound by the covenants of A? and can he sue C on covenants in the lease? Or is B bound by no covenants although the lease is good? Or is the lease bad so that there are no rights or liabilities between B and C at all? For the present the registration is dispensed with. There are three positions. If the covenants are binding between B and C, then it must be because A on receiving good title became constructive trustee for B, and having title leases to C, so as to give possession rightfully. Then A as the proper holder, at least of the reversion, would have a right to demand a subsequent conveyance, and as such would be assignee of the reversion, and the covenants would operate. The actual subsequent conveyance to B would not be necessary, however, as it had copyhold to another; and the question was whether the surrenderee could maintain an action on these covenants against the assignee of the lessee."

The decision gives no reasons for holding that he cannot; but Baron Parke says there was a clear reason. "The reversion by estoppel on the first lease was not a copyhold transferrable by surrender and admittance." By referring to the arguments of counsel in *Whitton v. Peacock*, however, it is apparent that this was not the claim of the defense, but that it rested upon a question of fact whether the tenants did not hold in a way that would prevent them from pleading *nil habuit* to the statement that the lessor had title at the time he made the lease—an averment which they claimed the plaintiff must make. The matter is immaterial for American cases, as we have no copyholds, and the main doctrine of *Palmer v. Elkins* is not refuted.

previously been attempted, so the law might consider that done. For this position of the covenants no case has presented itself. The more likely solution, however, would be the second. The land would fall into A's hands as a trust, and the lease to C would be good, while the reversion would run to B by estoppel; but the covenants being made with A after the actual deed on which the estoppel rests, the parties would be strangers, and covenants would not run between B and C. Compare *Webb v. Russell*, 3 T. R. 393. While there may be troubles in sustaining the reasoning, this would be the conclusion fairest to the parties if the lease to C is to be considered good.<sup>1</sup>

By the third and last supposition, however, the question would turn entirely on the right of A to make the lease. And if estoppel is to operate at all, it would seem that the conclusion must be that the lease is entirely bad; and so all covenants which it contains would be ineffective on the land. The notion of title inuring by estoppel seems to have had nothing to do with the equitable notion of a trust, although both may have originated in the idea that what should be done shall be considered done. The old estoppel was one of the inexplicable anomalies of the Common Law. The title related back and confirmed the earlier conveyance, very much like the doctrine of ratification in the law of agency. *Weale v. Lower*, Pollexfen 54; *White v. Patton*, 24 Pick. 324; *Knight v. Thayer*, 125 Mass. 25; *McCusker v. McEvey*, 9 R. I. 528. See 6 Gray Cases Prop. 586. This, then, completely shuts out the subsequent conveyances and anything that hinges on them; and such, it is submitted, would be the probable conclusion in case of covenants under the present law.

The registration laws have been considered ineffective

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<sup>1</sup> This would be likely to be the law in Pa., where the lease would be good. *Calder v. Chapman*, 52 Pa. 359. Cf. 6 Gray Cases Prop., p. 489.

upon the conclusion in the Pennsylvania cases, and it is likely that where those cases are followed these laws would be again passed over.

It will of course be remembered that where there is no estoppel there can be nothing to hold a covenantor to a successor of the covenantee. So where a tenant for life leases for a long term, or for another's life, there may be an estoppel during the life of the lessor, but not against his heir; and his heir cannot bring covenant. 2 Wm. Saunders 418, n. 1 to Walton v. Waterhouse.

The last subject to consider is the relation of covenants to the law of merger of estates.

As the covenant is incident to the estate, an assignment which gives the assignee the term together with the reversion destroys the estate to which the covenant attaches, and the covenant itself ceases at once. The reversion must be the immediate reversion, however, for otherwise there can be no merger. So where a sub-lessee assigned his holding to the original lessor there was no extinction of the immediate lessee's claims and his rights on a covenant for renewal still survived. *Piggot v. Mason*, 1 Paige 412.

In *Rochester Lodge v. Graham*, 65 Minn. 457, A and B, life-tenant and reversioner respectively in a piece of land, joined in conveying to C the third story of a building upon the land, B the reversioner covenanting with C to repair the roof when necessary. A and B later united in conveying their remaining interest in the property to the defendant. The roof having fallen into disrepair, C sought to have the cost charged against the land in the defendant's hands. But the court held that the defendant should not be charged at present, for so long as A lived he was enjoying A's life estate, and B's covenant ran only with the reversion; so an attempt at apportionment was made.

It would seem that the life estate merged in the reversion and was lost; and as the covenant had been attached to B's

free interest which still survived, changing from an estate in reversion to an estate in possession, the defendant should have been held to the covenant.

Of course if a right of action has accrued, though it be on a covenant to pay rent in advance for a use of a lease which afterwards merges, that particular right of action is not lost. *Townsend v. Read*, 13 Daly 198.

It is unnecessary to rehearse the law of merger, as it is sufficient to remember that the doctrine of extinction of covenants is thorough-going; and whenever an estate is merged so as to extinguish the estate to which the covenant is attached, assignees of the covenantee or covenantor can no longer enforce or be subject to the covenant. Thus in *Webb v. Russell*, 3 T. R. 393, R. Webb, mortgagee of a term for ninety-nine years held by one Stokes, leased with him to the defendant for eleven years, the defendant covenanting. Webb died and the plaintiff, his devisee and executrix, took the mortgage. Later Stokes became possessed of the fee and released it to the plaintiff who sued the defendant on his covenants. But Lord Kenyon held that the estate for years, having merged in the fee, the covenants, being incident to the particular estate, were lost to the plaintiff.<sup>1</sup>

There is no reason to believe that the original parties lose their actions, however, and so here, however much the estates merged, the plaintiff should have still had her right of action as executrix of the original covenantee for causes which accrued during his lifetime.

As the covenants attached to a piece of land are severable, so that assignees of part of the reversion can enforce them, it is similarly held that merger of part of the reversion destroys the covenants only so far as affects the portion of the

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<sup>1</sup> It was noted that if the plaintiff had not claimed to hold both estates in the same capacity she would not have been precluded, as in fact there was no merger of estates held as executrix and those held in her own name. This of course is immaterial, so far as the doctrine is concerned.

estate merged. So where the reversioner assigned to three joint tenants, one of whom was a joint tenant with another in the lease with covenants, whether one-third or one-sixth only of the reversion is merged, the other two tenants in the reversion can sue for a failure to repair the whole of the premises, although their actual judgment will be for but two-thirds of the adjudged damages. *Baddeley v. Vigurs*, 4 E. & B. 71.

So far as extinguishment of the covenant is concerned, it is noted that the case did not decide that a covenant would not be extinguished where one of the persons to whom the burden ran was at the same time one of those to whom the benefit ran, for they say that in this case the obligation did not arise until after the common person had died.<sup>1</sup>

A clearer case is *Lord Dynevor v. Tennant*, 32 Ch. D. 420, affirmed by the Court of Appeal in 33 Ch. D. 420, and by the House of Lords in 13 A. C. 279. A lease was made to make a canal, the lessors, three in number, reserving the right to bridge the intended canal. The lessors afterward divided their holding, one taking the land from which a particular passage crossed the canal. This he sold to the lessee; and it was held that whether the reservation was an easement or a covenant, the estate of the lessee in that part of the reversion had merged, and all rights to cross at that place had gone.

A rather surprising decision was made, however, in *Bailey v. Richardson*, 66 Cal. 416. A lessee sublet with covenants and then assigned or surrendered his lease to his lessor. The lessor received and collected from the sublessee the rents reserved in the sublease. The court held that no merger was brought about, as the lessor came in as an assignee of a reversion, and not as owner of the fee; and so was liable on the lessee's covenants to the sublessee.

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<sup>1</sup> On the law of merger, cf. *Lord Thre'r v. Barton*, Moore 94. And see fully in *Preston on Conveyancing*, Vol. 3.

There appears no difference between this and the assignment by a life-tenant in reversion to an owner of the fee, as was the case in *Webb v. Russell*; and that merger and the extinction of covenants is inevitable in all such cases, is unquestioned law. Indeed the English Legislature evidently realized that extinction of covenants would not be confined to cases like *Webb v. Russell*, for they used very broad terms to relieve against its injustice. Compare Mr. Sugden's statement of the statute, *Vend. and Pur.*, 14 ed., p. 583: "Where the reversion expectant upon a lease shall be surrendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant upon the same lease." 8 & 9 Vict., c. 106, §9; see 7 & 8 Vict., c. 76, §9.

No such American statutes have been presented; but as *Bailey v. Richardson* can hardly be followed under the Common Law in other states, the subject would seem one eminently needful of statutory revision.

In *Spencer v. Austin*, 38 Vt. 258, A and B, tenants in common, leased to C, reserving certain rights; B then conveyed his interest to D, and C conveyed half his lease to D. The court in equity held that there was no merger in D to defeat D's rights under the lease unless D had intended a merger on receiving the conveyances. It would seem, however, that this decision was due to a misconception of the English Law in *Forbes v. Moffat*, 18 Vesey 384.

## CHAPTER VII.

### THE RUNNING OF BENEFITS AND BURDENS WITH FEE ESTATES IN MODERN LAW.

Recurring to the line of investigation interrupted by the chapter on covenants in leases, it is now necessary to continue the main question to what extent covenants of any sort other than covenants for title have been allowed to run with land in modern times.

For this it is best to follow the customary division of the question, first as to the benefits of covenants, and secondly as to the burdens of covenants. That is to say, first, whether the successor of the covenantee can enforce the covenant in his own name against the covenantor; and secondly, whether the covenantee or his successor can enforce the covenant against the successor of the covenantor.

The object of this chapter is entirely to work out an intelligent state of the law, as well giving weight to the decisions as bearing in mind what from the history of covenants would naturally be expected to be the present law; and it would seem that we should expect both the benefits and burdens of covenants to run provided they are properly created and are of such a nature as to assimilate themselves to the crude notion of "concerning the land."



## I.

BENEFITS OF COVENANTS.—The general notion has been long indorsed that the successors of covenantees can always have the benefit of covenants, and that they can sue in their own name at law. Exactly how this happened to be so generally agreed upon, it is hard to tell, as every other question of covenants has become so entangled. The probable explanation is that in the running of benefits the spirit of the original use of the covenant was so apparent that its doubt never seemed to appeal to the judges. It was more nearly approximated to the law of warranty as that had been developed in the covenant for title; which is in its essence the mere running of a benefit. And as there was but a slight step from one benefit to another, it was at once granted that the benefit of any covenant concerning the land might readily run at law. It is believed, therefore, that these benefits were accepted from a mediate reasoning from covenants for title which in turn rested on charter warranty, that in turn coming from the old warranty as a matter of damages rather than a matter of kind. If instead of reasoning thus, the judges had looked back and had seen that benefits ran from a direct similarity to old warranty, as is evident from their origin before the full development of title covenants, they would hardly have come to the conclusion that benefits alone can run. It is not, however, the first case in the law where the real reason has passed into oblivion and a thinking but incautious period has invented reasons which gave a bias to the law.

Strangely enough, however, while this running of benefits has been accepted, there is not, it is thought, a single English decision that such a benefit will run until comparatively late days. There is no lack of them in America, it is true, but at the same time the American courts were free in holding that burdens of covenants would run as well. The editor

of Smith's Leading Cases asserts as his conclusion that benefits have been established as running, but he cites no cases but cases of covenants for title and cases of leases, from the cases in Norman French to the rise of the equitable doctrine of *Tulk v. Moxhay*.<sup>1</sup> A possible express indorsement of the notion may be found in the case of *Sharp v. Waterhouse*, 7 E. & B. 816, where it was assumed that the devisee of land benefited by a covenant in an indenture which granted an easement might sue for the benefits of the covenant. But the real decision on the facts was only that an apparent additional covenant was not intended to be a covenant, and indeed this case has been entirely overlooked in discussions upon the subject. Moreover, the grant was only an easement, and the running of covenants with easements is in great question in England (see post, Ch. IX, sec. 3); so that *Sharp v. Waterhouse* will hardly be a safe example of the law. Lord Eldon even went so far as to question whether a benefit could ever run in deciding *Collins v. Plumb*, 16 Vesey 434, which he decided on other grounds; and Lord Justice Lindley questioned whether any benefit could run in *Austerberry v. Oldham*, 29 Ch. D. 750.

But no one now denies that the benefit of a covenant does run with the land. There is an equitable indorsement of it in the decision in *Barclay v. Raine*, 1 Sim. & Stu. 449; and it has been frequently indorsed in dicta at law and in equity, as by Lord Abinger in *Raymond v. Fitch*, 5 Tyr, 985, and by Lord Justice Cotton in *Austerberry v. Oldham*, 29 Ch. D. 750, although other members of the court in that case questioned it in connection with the decision that the burden of a covenant would not run.

In America there is abundant authority that the benefit of covenants runs with the land,<sup>2</sup> and so far as has appeared there is no decision that rejects it.

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<sup>1</sup> 2 Phill. 774, see post, Chapter XI.

<sup>2</sup> *Cinti. v. Springer*, 23 Wkly. Bul. 250; *Springer v. Phillips*, 71 Pa.

In at least two American cases, however, *Lydick v. B. & O. Ry.*, 17 West Va. 427, and *Carson v. Percy*, 57 Miss. 97, the reason given for the running of benefits is different from the commonly accepted historical one. It is set out that the covenant runs because it was part of the consideration contracted for in the acceptance of the land. In short, that it requires notice to the assignee of the land that it has the benefit of covenants in order to allow him to enforce them. It can hardly be said that these decisions were intended to rest upon this reason, but if this theory is to be held the true one it is at least very far-reaching. If one grant were made without the express mention of the covenant, then the benefit of the covenant would be forever lost, and no subsequent mention of it would avail, as it would then form no part of the consideration for the purchase. Nor could that particular covenant be afterward revived, as the possessor of the land once without the covenant, could never give to the grantee from him more than as grantor he held; and the connection with the original covenantor and his burdened land would no longer exist for a new covenant. Moreover,

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60; *Dunbar v. Jumper*, 2 Yates 74; *Dailey v. Beck*, 4 Clark 58; *Clark v. Martin*, 49 Pa. 289; *Muzzarelli v. Hulshizer*, 163 Pa. 643; *Ry. Co. v. Ry. Co.*, 171 Pa. 284; *Green v. Creighton*, 7 R. I. 1; *Weill v. Baldwin*, 64 Cal. 476; *Raby v. Reeves*, 112 N. C. 688; *Maine v. Cumston*, 98 Mass. 317; *Cutter v. Wms.*, 3 Allen 196; *Carson v. Percy*, 57 Miss. 97; *Countryman v. Deck*, 13 Abb. N. C. 110; *Avery v. Ry.*, 106 N. Y. 142; *Stewart v. Aldrich*, 8 Hun. 241; *Nye v. Hoyle*, 120 N. Y. 195; *Graves v. Deterling*, 120 N. Y. 447; *Mott v. Oppenheimer*, 135 N. Y. 312; *Dey v. Prentice*, 90 Hun. 27; *Wooliscroft v. Norton*, 15 Wisc. 198; *Snyder's License*, 2 Pa. Dist. Ct. 785; *Bean v. Stoneman*, 104 Cal. 49; *Ry. v. Reno*, 22 Ill. App. 420; *Sterling Co. v. Williams*, 66 Ill. 393; *Fitch v. Johnson*, 104 Ill. 111; *Hazlett v. Sinclair*, 76 Ind. 488; *Peden v. Ry.*, 78 Ia. 131; *Curtiss v. White*, Clark Ch. 389; *Watertown v. Cowen*, 4 Paige 510; *Dexter v. Beard*, 7 N. Y. Supp. 11; *King v. Wright*, 155 Mass. 444; *Shaber v. Water Co.*, 30 Minn. 179; *Hamm v. Same*, *ibid.* 185; *Guentzer v. Juch*, 4 N. Y. Supp. 39; *Lydick v. B. & O. Ry.*, 17 West Va. 427; *Cf.*, *Scott v. Lunt*, 7 Pet. 596; *Morse v. Aldrich*, 19 Pick. 449; *Savage v. Mason*, 3 Cush. 500; and *cf. semble contra*, *Barron v. Richard*, 3 Edw. Ch. 96.

if notice is important it becomes a difficult question what shall constitute notice. Must it be in writing? Must it be in the deed? Must it be in express words? or shall it pass with "all easements, appurtenances, &c."? If this last is sufficient, which is generally deemed sufficient to pass other claims, then must it not be proven that the grantee understood it to mean the benefit of covenants? else the covenant would not have been a consideration of the purchase.

It will be noted that this difficulty is not involved in warranty or covenants for title, as the grantee may well be presumed to contract only for a good title. The difficulty is fundamental, but it is hardly to be believed that the courts would attempt to enforce such a notion of the running of covenants, as well for the difficulty of proof in action as for the difficulty of ascertaining whether there is a cloud upon titles on the burden side of the land. It would seem safe to presume that where the covenant is properly created and of the nature to run with the land, its benefit can run until it has been released or for other reasons it becomes unenforceable by the passing of time. } (See post, p. 171.)

But before leaving the subject of benefits, which have been thus far considered from the standpoint of rights recognizable under the Common Law, the attention of the reader must be called to certain conceivable views of the running of benefits which, while equitable benefits in fact, have been offered as explaining many cases at Common Law. So far as the principles are exclusively equities, they will be considered in a later chapter, but to the extent that they are enforced by law, they must be noted here. And it might be said, moreover, that on this theory the benefit may run because its running was contracted for, although the assignee to whom it runs does not know of it when he buys from the covenantor. This is not at variance with the reasoning just above, that it is impossible for a covenant to run where there is no notice, for it is a question of a trust, and for the benefit

of a trust to run, references need not here be given that notice is unnecessary.

In *Morse v. Aldrich*, 19 Pick. 449, there had been a grant between the plaintiff's and the defendant's ancestors, containing a covenant that the successors of the vendee might periodically drain a pond on the land of the grantor for the deposit of mud on the bottom, available as a fertilizer. The defendant had notice of the covenant, and the plaintiff enforced his right by covenant at Common Law. The suggestion has been made that this right to the mud was a tangible right for which the original vendee contracted, and being conceivable as property,—a profit,—it may be abstracted from the land of the grantor and, though incompletely granted, should be regarded by the grantor and his assigns as an equitable charge for the grantee and his assigns, thus going to them whether they have notice or not. The grantees and their assigns, then, having this equity, sue for it in law under covenant, either as beneficiaries to the original covenant, in states like New York, where beneficiaries may sue on contracts, or by the authority of *Pakenham's Case*, Y. B. 42 E. III, 3, which enabled the owner of an incorporeal hereditament to sue in covenant to enforce his rights, as was discussed in Chapter II.

The whole theory is very involved, and apart from its artificiality, seems to have several grave difficulties. It was not taken by the court in *Morse v. Aldrich*, but is suggested to explain that case and the party-wall cases to be discussed later.

In the first place, it can only apply to those covenants which amount to equitable incorporeal hereditaments. The right must be a recognizable subject of property; for it must be a charge upon the grantor. This is enough to show that it does not explain all the cases. Then to bring the right into a law court, it requires one of two methods, either allowing beneficiaries on a covenant to sue in their own

names, a right by no means common in older jurisdictions, or the enforcement of incorporeal hereditaments by covenant, a very doubtful right itself, though it may have been allowed at old Common Law.

Of course, as between assignees of the grantee and the original grantor, if beneficiaries on contracts can sue, all cases of the running of benefits are explained without any charge; but that solution cannot explain English cases, as in England beneficiaries cannot sue on contracts to which they are not parties, and it does not explain beneficiaries' rights against assignees of the grantor, as assignees of the burdened property are complete strangers to the contract. But however feasible this explanation of charges and the suit in covenant for incorporeal rights may be for the suggested cases, it seems unsatisfactory historically from the other cases that have come down to us. Another opportunity to consider it, however, will present itself in the investigation of the running of burdens, and in the collateral investigation of rights in equity.

## II.

BURDENS OF COVENANTS.—We come now to the mooted question whether the burden of a covenant can be made to run with the land to the assignee of the covenantor. From the review of the cases (*supra*) down to the Statute of 32 Henry VIII, 34, there would seem to be every reason to suppose that burdens can run, and that they were made to run without any hesitancy on the part of the early lawyers. From that statute to the time of Lord Coke's reports there appears nothing to change this view; and since Lord Coke's time the doctrine that they cannot run seems to rest largely upon rambling discussions in late cases. Without careful analysis the judges have frequently begun their discussions by saying that it seems fairly clear that before this statute covenants ran with the lease but not with the reversion, and that the

burden of a covenant would not run at Common Law.<sup>1</sup> Though the counsel in arguing in *Webb v. Russell*, 3 T. R. 393, went so far as to say that the Statute of 32 H. VIII contains a mistake in its preamble, and by transposition was meant to state that covenants would run with the land, yet whatever grounds that suggestion may have, the court paid no attention to the suggestion, but followed the idea that covenants will not run with reversions.

For the denial of the running of burdens, *Brewster v. Kidgill* has been thought to furnish a clear footing. The case has been reported in many places and the exact holding is in much doubt; but the dicta of Lord Holt, one of the judges, are fairly clear that he thought the burden of a covenant should not run.<sup>2</sup> The action was one of case for a rent granted out of an estate of the defendant's predecessor who had covenanted to pay the rent, free of all taxes, etc., upon either the rent or the charged land. The defendant sought to deduct a tax imposed by Parliament, and the court held that he could not do so. They also held that the rent bound the land, though whether as a grant or a covenant is not clear. Holt said, "If this covenant should charge the land, it would be higher than a *warrantia chartae*, which only affects the land from the judgment therein given;" but exactly what he meant by this is difficult to tell. It is true that Littleton says that *warrantia chartae* binds only from judgment given; but it is conceived that Holt's comparison is imperfectly made. Warranty may well have bound the land in one sense, and yet have left the warrantee a certain difficulty in reaching the lands so bound. The land was always alienable, of course, so long as there was not a judgment against it; and if before that time the land had been

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<sup>1</sup> Serg. Wms.' note to *Thursby v. Plant*, 1 Wms. Saund., p. 240, n. 3.

<sup>2</sup> The case is reported in 5 Mod. 369, 12 Mod. 166, 1 L. Raym. 317, 1 Salk. 340, Carth. 438, Holt 169, 669, Comb. 424, 466.

aliened the warrantee would have had his action for nothing, as he would have to bring another action against the then owner of the land to have his judgment executed. The method of enforcing the warranty was always a personal action; and in that light there is no difference between this and the working of covenants which bind the then owner of the land, for when he aliens he is free, unless, of course, he is the first covenantor, and a party himself to the covenant.

But Holt's position rapidly gained support, and Lord Kenyon, in his decision in *Webb v. Russell* (supra), notwithstanding the argument of counsel, sustained the view that the burden of the covenant would not run with the grant of land.

But this, too, was merely dictum, and the question was much longer to remain debatable in the English courts, for grave doubts still entertained on this subject found occasion for early expression in the celebrated case of *Roach v. Wadham*, 6 East 289. In that case there was a conveyance to one Coates to the use of such as Watts should appoint by deed or will, and in default of appointment, to Watts in fee, reserving a rent which Watts covenanted for himself and assigns to pay. Watts then by deed appointed to one Wadham, all joining, and Wadham covenanting to pay the rent. Wadham willed to the defendant, whom the plaintiff sues in covenant for the rent. Therefore the question was whether the defendant took under the power, in which case he would not have been privy to Watts' covenant, or under a grant from Watts in default of appointment, in which case he would have been privy to the covenant. That question Lord Ellenborough, who delivered the opinion, admitted was dependent upon whether Watts had intended an appointment or a grant; and taking all the circumstances into consideration, Lord Ellenborough concluded that Watts intended an ap-



pointment, and so discharged the rule without discussing whether the action of covenant would have lain or not.

Mr. Sugden, in his "Vendors and Purchasers," thinks this decision may be taken as assuming that the burden of the covenant was regarded as running, else he thinks there was nothing to argue; for in neither case would the defendant have been liable. But Mr. Sugden seems to have misunderstood the court's position. Admitting that the running of the covenant was debatable, that question need not come up at all if the court were decided that the conveyance was the mere exercise of the power. This they decided to be the case, and so the other question remained undecided.

It is exceedingly likely, however, that Lord Ellenborough's opinion was that the covenant would run, as appears from his reference to a discussion which he evidently had with the plaintiff's counsel. He says: "Though the plaintiff's counsel at first insisted that the power was nugatory, and that the conveyance necessarily operated on the interest of Watts, yet he afterwards abandoned that ground in his reply, and agreed that the only point was whether the conveyance operated on the interest which Watts had, or as an execution of the power, and that it was a question of mere intention. And if that be so, it ought to appear very clearly that the covenants and provisions in the deeds cannot take effect, if the conveyance should be holden to operate as an appointment in order to authorize the court so to determine." \* \*

But the decision in *Roach v. Wadham* was not taken to end the question in favor of the running of burdens, any more than the earlier decisions had been entirely accepted the other way; and the point still remained open.

Lord Eldon was in doubt about the law of covenants when he decided *Collins v. Plumb*, 16 Vesey 434; and Sir John Leach was not anxious to render an opinion upon them when he decided *Barclay v. Raine*, 1 Sim. & Stu. 449. We learn, however, from a note in 7 Jarman's *Bythewood* 572, that Sir

John Leach was of opinion that the burden of covenants could run with land.

Next comes the implication from the decision in *Vyvyan v. Arthur*, 1 B. & C. 410 (see p. 112), where the question, to be sure, was the running of a lessee's covenant to grind corn at a mill of the lessor's to the assignee of the reversion. But Bailey, J., and Holroyd, J., distinctly say that this covenant they think operates by the Common Law and not under the Statute of Leases, placing their decision upon what they deem the authority of *Pakenham's Case* in the year books (see Ch. II). "The suits and services are to be rendered by the lessee, his executors, administrators, and assigns to whom the lands are leased; and this suit is to be rendered to the mill of the lessor, his heirs and assigns; so that it appears to have been the intention that the assignees of the lessor and lessee should be bound, for they are expressly named."

It is queer, after this decision, that Mr. Sugden granted the point that covenants did not run with the reversion at Common Law,<sup>1</sup> while he still maintained that the burden of covenants in grants would run with the land.<sup>2</sup>

Following this comes the argumentative discussion of the question by Lord Brougham as Chancellor in *Keppel v. Bailey*, 2 M. & K. 517. The decision did not involve the question, for it was on a lease holder's covenant with a Railway Co. for the exclusive use of their road, the covenantee suing the assignee of the covenantor. The court held the particular covenant a stranger's covenant and therefore not capable of running, but Lord Brougham advanced a utilitarian doctrine, which is emphasized by the editor of *Smith's Leading Cases*, and which has no doubt had great influence upon the eventual outcome of the law. He points out that while the running of benefits imposes no obligation which was not contemplated, and so not inequitable, yet the run-

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<sup>1</sup> V. & P., 14th ed., p. 583.

<sup>2</sup> V. & P., 14th ed., p. 596.

ning of burdens may cause the fall of a liability upon one who had subjected himself unawares, so that the enforcing of a legal right might occasion the greatest injustice. The suggestion no doubt seems strong, and must be considered before coming to a conclusion on the whole subject; but it is opportune to remember that the experience of the greatest jurists has taught us to be careful of a method of decision supported by the apparent justice of a case in disregard of the deeper principles or analogies of the Common Law. It is evident that Lord Brougham's distinction between benefits and burdens can rest only on an exercise of the judge's power to be followed only where there is not the least doubt that such a course would receive the unanimous endorsement of administrators of the law.

From about the time of *Keppel v. Bailey* the running of burdens in England became less and less sustained. In *Whatman v. Gibson*, 9 Sim. 196, and in *Mann v. Stevens*, 15 Sim. 337, restricted building covenants were enforced in equity against assignees taking with notice, the court doubting whether there could be brought an action at law. And in due time came the equity decision of Lord Cottenham in *Tulk v. Moxhay*, 2 Phil. 774, from which date the fuller recognition of equitable rights and the firm repression of all future attempts to gain any recognition in law.

In only three other cases was the notion that burdens could run at Common Law maintained by the courts. Lord Romilly believed that they could run and said so in two cases. In *Western v. McDermott*, L. R. 1 Eq. 449, covenants by all the householders in a row to preserve gardens were enforced by injunctions, Lord Romilly holding that the benefits and burdens of the covenants ran with the land. But on appeal, L. R. 2 Ch. 72, the court held it merely an indorsement of *Tulk v. Moxhay*, and refused to decide the question of the burdens running as covenants. Yet Lord Romilly expressed

himself as of the same opinion in *Morland v. Cook*, 6 Equity 252.

Once more, in *Cooke v. Cilcott*, 3 Ch. D. 694, the Common Law running of burdens was endorsed. There was a conveyance of land, the vendee covenanting to supply water to other lots of the vendor. The vendor sold one of these lots to the plaintiff, and the vendee sold the lot on which the water was to the defendant, both having notice of the covenants. The defendant refused to continue furnishing the water, and the plaintiff sought relief in equity by a mandatory injunction. Vice-Chancellor Malins held that the burden of the covenant ran with the land to the defendant, but at any rate that notice of its existence made him liable. The case seems to have been appealed, but the best explanation of it appears in the argument of counsel in *Hayward v. Bldg. Society*, 8 Q. B. D. 403.

"*Cooke v. Chilcott*," the learned counsel said, "is the only instance in which the covenant was not a restrictive one, and there Malins, V. C., was of opinion that the covenant ran with the land; so that it was not necessary in that case to resort to the doctrine of notice. When that case came up upon demurrer before the Court of Appeal there was no decision on the present point, as on the pleadings the defendant had admitted his liability on the covenant, and it was on that ground alone that the Court of Appeal affirmed the decision of the Vice-Chancellor." And then the learned counsel endeavored to point out that there was really an easement in *Cooke v. Chilcott*.

These three cases, however, had no permanent effect, for close upon them comes the first and only decision at law that the burden of covenants will not run with the land. In *Hayward v. Brunswick Building Society*, 8 Q. B. D. 403, in the Court of Appeal, the facts were that A., possessed of land, had deeded it to B., reserving a yearly rent, and B. had covenanted to repair and to produce the rent. A. assigned

the rent to the plaintiff, and B. assigned the land to the defendant. The plaintiff sued the defendant for his failure to repair. The facts were about the same as those in *Milnes v. Branch* (post, p. 199), and Brett, L. J., thought that case a binding authority that the benefit of the covenant would not run with the rent to the plaintiff. But Cotton and Lindley, L. JJ., discussed the point of the burden running, and considered that allowing it to run would be an extension in law of the equity doctrine of *Tulk v. Moxhay*, although they admitted that the plaintiff here had no right to appear in equity. They regarded *Tulk v. Moxhay* as limited to restrictive covenants, and without further discussion gave judgment for the defendant.

Whatever may be said of this decision otherwise, it is not a discussion of the question at all. So it must be admitted that the law in England rests only upon the earlier dicta and certain decisions in equity, of which probably the most important is *Austerberry v. Oldham*, 29 Ch. D. 750.<sup>1</sup> There land was conveyed out of a larger piece for the purpose of a public road, the trustees who received it covenanting to make and repair the road. Assigns were named in the covenant. Both properties were assigned with notice of the covenant, and the assignee of the landed property sought by bill in equity to compel the assignees of the road to keep it in repair. The Court of Appeal, Cotton, Lindley, and Fry, L. JJ., held

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<sup>1</sup> In *Butler v. Archer*, 12 Irish C. L., N. S. 104, A granted land to the defendant reserving a fee farm rent to him, his heirs and assigns, and agreeing that an amount might be deducted from the rent for repairs. A assigned the rent to the plaintiff, who sued the defendant for arrears. The defendant sought to deduct repairs, claiming that the agreement to allow it ran against the plaintiff; but the court held that the deduction was not allowable, as burdens of covenants did not run except with leases under Stat. 32, H. VIII. Some of the court thought, however, that the rent less the repairs constituted the whole reservation. It seems not to have been noticed, that to allow the burden to run would have been, moreover, allowing a covenant to run with an incorporeal hereditament, contrary to settled English law. (See post, Ch. IX, sec. 3.)

that the burden of the covenants would not run, and doubted whether the benefits would run. They decided that there was no binding decision that burdens would run, and that it was not such a restrictive covenant as could be enforced in equity.

Since that decision, 1885, the question seems not to have been argued in England; and as it was a decision by the Court of Appeal, it will probably be regarded as settling the English law, unless it be raised in future in the House of Lords. It is of course possible that the highest court may yet change the condition of the law, especially as none of the present advisors of that body has been a member of any of the lower courts who have rendered the decisions containing dicta against the running of covenants; but as the accepted notion has come to be that the burdens will not run, a further argument of the question is not likely to meet with encouragement.

So much for the English law. The weight of American decisions, however, seems to follow the contrary view. Worked out largely for themselves, without any English authorities of recent date, it is rather to be expected that the rational course of the law would lead the courts to a conclusion contrary to the English. And while some of the states, which notably follow the yearly trend of English decisions, have renounced the historical trend of covenants and developed the notion of *Tulk v. Moxhay*, it may be said broadly that those states are exceptions. Perhaps the early acceptance of the burden of covenants may have been occasioned by the accidental rise of cases which emphasized rather the advantages than the objections to their running. Such are the early party-wall agreements in Massachusetts, and the mill grants in that and other states. Of course these decisions in neighboring states and the easy confusion of the English decisions on leases have rendered it comparatively easy for newer states to extend the doctrine until it has become well nigh universal.

For convenience it is thought not unwise to follow the decisions out in the different states. They are taken up as nearly as possible in the order in which the doctrine arose in the several jurisdictions.

Probably the earliest American decisions on the running of covenants are in Pennsylvania. In *Dunbar v. Jumper*, 2 Yeates 74, A, the possessor of certain lands, sold a half acre to B for a mill, "yielding and paying to A and his family" the right to grind corn free at B's mill so long as they should consume it on the plantation. It was a jury case, and the jury were directed that the burden ran to B's assign. So in *Herbaugh v. Zentmyer*, 2 Rawle 159, where a father had sold land to his son, who had covenanted to pay a certain amount of different cereals yearly, it was held that a purchaser at mortgage sale of the son's estate was bound by the covenant. It was added, however, that the covenant was but an obligation to pay rent in kind instead of in money. But it is clear from the earlier decision of *Kunkle v. Wynick*, 1 Dall. 305, that the notion of the distinction between debt and covenant for rent had been emphasized; so the case must support the running of the covenant.

The covenants to pay ground rents were afterwards enforced in Pennsylvania expressly as covenants running with the land in *Hurst v. Rodney*, 1 Wash. C. C. 375; *McQuigg v. Morton*, 39 Pa. 43; *Conrad v. Smith*, 5 Weekly Notes of Cases 402; *Springer v. Phillips*, 71 Pa. 60; and *Ritzman v. Spencer*, 5 Pa. Dist. Ct. 224. And in *Fisher's Executors v. Lewis*, 1 Clark 422, the additional covenant to build for the security of the ground rent was enforced against the assignee of the covenantor; so there is not any doubt of the full import of the decisions. See also *Church of the Incarnation v. Williams*, 5 Pa. Co. Ct. 641. But the assignee of the rent is not bound by the burden of a covenant made by his assignor who reserved the rent. *Provident L. and T. Co. v. Fiss*, 147 Pa. 232.

In *Dailey v. Beck*, 4 Clark 58, a stipulation in a deed of a lot that a certain street should be opened for the benefit of the lot was held to be a covenant that could run with the land until broken, though in that case it was broken in the lifetime of the first grantor; and in *Muzzarelli v. Hulshizer*, 163 Pa. 643, and *Landell v. Hamilton*, 175 Pa. 327, restrictive building covenants were handled in equity as covenants which bind the land, although in the latter case it was held that the intention had not been that the covenant should be perpetual. And see *St. Andrew's Church's Appeal*, 67 Pa. 512; *Batley v. Foederer*, 3 Pa. Dist. Ct. 167.

In *Horne v. Miller*, 136 Pa. 640, A and B, owning adjoining lands, executed a recorded agreement as to the use of the waters of a stream running between them. It was to bind the heirs and assigns. The court held that these were covenants running with the land on both sides and gave the plaintiff damages at law for an alteration in the stream caused by the defendant. The court thought this was no particular burden imposed upon either piece, but a fair apportionment of uses for the benefit of each, whatever the legal significance of that may be. See also *Snyder's License*, 2 Pa. Dist. Ct. 785.

Finally in *Bald Eagle Valley Ry. Co. v. Nittany Valley Ry. Co.*, 171 Pa. 284, where a land company had executed a mortgage to a trust company to secure an issue of bonds, of which a Railway Company was to take a large share, and the mortgage contained a covenant by the land company to give all its traffic to the railroad company, it was held that the railway could enforce this covenant against the assignee of the land company by enjoining the building of another railroad under contract with the assignee for a delivery of its traffic to the defendant railway company. The equitable side of it will be discussed later, but the decision involves the burden of the covenant running with the land.

In commenting upon the Pennsylvania law it has been



said that in Pennsylvania the Statute of Quia Emptores has never been held in force and that the relations of tenure would explain the running of covenants there. Aside from the fact that none of the Pennsylvania decisions is rested upon that idea, it is submitted that the existence or non-existence of Quia Emptores is immaterial. Of course the existence of tenure would insure the running of covenants, but it has been attempted to show that covenants found their origin in express warranties rather than in implied warranties, and we have seen that express warranties existed and ran every way after the Statute of Quia Emptores had cut off tenure entirely.<sup>1</sup>

*Massachusetts.*—In *Wheelock v. Thayer*, 16 Pick. 68, and *Plymouth v. Carver*, 16 Pick. 183, the question of burdens of covenants was before the court, but it was held that the grants there were not such as would allow the running of covenants; and a similar decision was reached in *Hurd v. Curtis*, 19 Pick. 459. In none of these cases, however, was it thought that it was impossible for burdens to run with the land. But in *Morse v. Aldrich*, 19 Pick. 449, the court held without doubts that the burden of a covenant did run with the land. A conveyed land to B, covenanting that B should have access to A's land for soil for certain purposes. B conveyed to C, and C and A being in dispute over the covenants, A covenanted to drain his pond at intervals that C might get the deposit for fertilization. The property of C came to the plaintiff, and that of A to the defendant. For a refusal to carry out this covenant the plaintiff sued for damages and was allowed to recover. See also *Thomas v. Poole*, 7 Gray 83. Then comes the first of the party-wall decisions, the case of *Savage v. Mason*, 3 Cush. 500. A, owning land, conveyed a lot to B with covenants that party-

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<sup>1</sup> The running of the burden of covenants has lately been reindorsed in Pennsylvania in *Electric City Land & Improvement Co. v. West Ridge Coal Co.*, 41 Atl. Rep. 458.

walls might be built, half upon each adjoining lot, the one who first desired to build putting up the wall, and the other owner or his assigns upon using the wall to pay half the cost of building it. The assign of B put up a wall, and the assign of A's adjoining lot, on using the wall, was compelled to pay half its value, according to the covenant. The court held the burden to run, delivering the following much quoted language: "A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land." This case presented the running of covenants in its most advantageous light, and very probably had much more to do with the development of the law in America than its mere citation will indicate.

The running of the party-wall covenants was afterwards indorsed in Massachusetts by *Cutter v. Williams*, 3 Allen 196; *Standish v. Lawrence*, 111 Mass. 111; *Richardson v. Tobey*, 121 Mass. 457; *King v. Wright*, 155 Mass. 444; and *Pfeiffer v. Matthews*, 161 Mass. 487.

In *Maine v. Cumstom*, 98 Mass. 317, the conveyances containing the party-wall agreements were deeds poll expressing the agreements as conditions; but the court held that the acceptance of the deed implied the acceptance of the condition and allowed the assign to be liable in contract. (See post, Ch. IX, sec. 1.)

*Bronson v. Coffin*, 108 Mass. 175, before the court again in 118 Mass. 156, brought up the running of a covenant to fence. A, owning land, granted a strip through it for the building of a railroad and covenanted for himself, his heirs and assigns perpetually to maintain a fence on his land the length of the railway track. Later a part of the land not immediately contiguous to the railroad was sold to the plaintiff, who now claimed that it was encumbered. The court held that it did not encumber the whole land, but only the part on which the fence was built; that an easement in the

nature of an obligation to fence was created in the grantor's land and that with this easement ran the covenant to fence as a covenant running with the land. Of course this became merely a covenant to do what the spurious easements imposed anyway, but the case is an authority expressly that the burden of the covenant runs with the land; and this Mr. Justice Gray intended, for he quoted the authorities to that effect in *Massachusetts*. There has been an exceeding looseness in the American decisions in speaking concurrently of easements and covenants in many instances as if they meant the same thing. Indeed Washburn says that an easement is the grant of the obligation to do or refrain from doing a certain thing on the land of the grantor; "or may be created by a covenant." Whatever he meant to say by this, it is to be noticed that *Bronson v. Coffin* is no authority for anything more than this: Granted that an easement was intended to be created, this covenant will run with it. That an easement was intended to be granted, Mr. Justice Gray concludes only from the whole matter. It is believed that, bearing this in mind, many of the cases involving easements in other jurisdictions will be more easily handled. In *Parrish v. Whitney*, 3 Gray 516, the earlier decision that a stipulation for fencing would not run with the land, it will be noted that the deed was only a deed poll, and so of course the grantee had not covenanted at all.

In *Middlefield v. The Knitting Co.*, 160 Mass. 267, the town had been bound to repair a bridge over a certain creek, and the landowners along the creek, desiring to raise the water by a dam for the purpose of milling to a height which required a longer bridge, built the new bridge and covenanted to repair it. The land and mill in question came to the defendant, and the town sought by action of contract to get damages for his failure to repair the bridge. Mr. Justice Holmes, delivering the opinion, held that the burden fell upon the defendant, but suggested that the covenant to repair,

like the covenant to fence, was in the nature of a spurious easement and formed an exception to the notion that the burden of covenants will not run. For the notion that the covenant to repair is in the nature of a spurious easement Mr. Justice Holmes is the leading authority, and we have seen that there is no authority in Massachusetts for the confusion of spurious easements and covenants. Whether it is the stepping stone in Massachusetts for that court to repudiate its general doctrine that the burden of covenants will run with the land, only the future can determine. But from Mr. Justice Holmes' later opinion in equity in *Norcross v. James*, 140 Mass. 188, it would seem that he thought that all covenants concerning the land would run, on the broad notion that they were all easements.

For other examples of the burden of covenants enforceable in Massachusetts see *Jeffries v. Jeffries*, 117 Mass. 184; *Tobey v. Moore*, 130 Mass. 448.

*New York*.—In *Van Rensselaer v. Smith*, 27 Barb. 104, the assignment of a rent reserved out of a grant in fee was held sufficient to carry the covenant to pay the rent. The court explained that the Statute of *Quia Emptores* had never been enforced in New York, the laws never having been worded to re-enact it; and hence there might be tenure in fee. Therefore a covenant to pay rent ran from the tenant to the lord or the lord's assignee through the presence of pure privity of estate, or ownership by lord and tenant in the same property, as in leases at the present day. It has been attempted to show in connection with the Pennsylvania cases that the existence or non-existence of the Statute of *Quia Emptores* need have little to do with the law now, but it is clear that its non-existence would insure the running of covenants to pay rent. See also *Tyler v. Heidorn*, 46 Barb. 439.

But whether the absence of that statute alone is enough to explain the running of other covenants in New York

would seem of more doubt. The party-wall covenants created in grants of easements, and binding not the easement granted, but the land reserved, and indeed all covenants binding other land of the grantor, involve a different principle from the pure privity of estate which is identity of ownership by lord and tenant in the same land. Those covenants seem rather to run by analogy than for any tenure existing between the parties, and after all seem to involve recourse to the express warranty to explain their operation. Thus in *Nye v. Hoyle* (see post), there was a grant of land, but the covenants of the grantor and grantee to repair the mill dam were to be performed on different land from that granted. It is clear from New York cases, however, that whatever analogies were needed were strictly required to be carried out, and no state is more careful to require the covenants to accompany some kind of grant than New York. *Lawrence v. Whitney*, 115 N. Y. 410.

*Barrow v. Richard*, 8 Paige 359, indicates that it was thought that the burden of a covenant would run in New York, but the decision itself was based upon equity. A granted a lot to B, requiring of the grantee a covenant restricting its use, but A seems to have made no covenants as to the remainder. Then A sold off other land to C, who made the same restrictive covenant. Upon C's breaking this covenant the court thought B might not be able to sue C at law, since the grant to B preceded that to C, so that B was not an assignee of C's covenantee after the covenant; but for the reason that the covenant was evidently intended for all the surrounding lot owners, B was allowed to enjoin C in equity.

The first New York case really deciding the running of burdens seems to be *Denman v. Prince*, 40 Barb. 213. A, owning land, granted a mill site to the plaintiff and covenanted to pay half the cost of repairing the dam. The court held that this covenant ran with the rest of A's land assigned

to the defendants, and that the plaintiff might recover the defendant's share of the cost. In *Hills v. Miller*, 3 Paige 254, and in *Trustees of Watertown v. Cowen*, 4 Paige 510, right to enforce the maintenance of open ground had been sustained in equity, but the cases seem pretty clearly instances of easements, so they need hardly be referred to except for comparison.

Some doubt, however, was thrown upon the New York law by two decisions upon party-walls, one by the Commission of Appeals in *Cole v. Hughes*, 54 N. Y. 444, and the other in *Scott v. McMillan*, 76 N. Y. 141. In the former of these cases the agreement was between two adjoining lot owners, one to build the wall and the other to pay on user, and the heirs and assigns of both were included in the covenant, so that there is no doubt as to the intention of the parties. The one who built, however, assigned the right to recover to one person and the land to another, and in time the assignee of the adjoining lot obtained a half ownership in that lot also which had been first built upon. On building himself, the assignee of the right of recovery sought to recover half the value of the wall. In this state of affairs the court held that the right of recovery did not go with the land, as it did not benefit it; and then decided that the duty of paying did not run with the land to the defendants. They noted a distinction between benefits and burdens, but said that burdens could not run without a privity of estate; and that there had been no grant of interest in land here, so that the obligation was purely personal. How far the matter of grant had been carried out will come up later, but the decision is that the burden did not run because there had been no grant; and barring that point, the case is not troublesome. The other case, *Scott v. McMillan*, was substantially the same as *Cole v. Hughes*, and followed it.

These cases are probably shaken, even on that point, by

Hart v. Lyon, 90 N. Y. 663, but they concern us no farther at present.

In Avery v. New York Central Ry., 106 N. Y. 142, land had been conveyed to the defendant's predecessor, the deed stipulating that "This conveyance is upon express condition that the said Railway Co., their successors or assigns, shall at all times maintain an opening into the premises hereby conveyed, opposite the hotel," etc. The court held this a covenant running with the land, enforceable by the grantor's lessee against the grantee's assign by a bill in equity to have the fence opened.

In Post v. Weil, 115 N. Y. 361, the "express condition" in a former deed that a tavern should not be erected upon the land in question was held to indicate an intention for a covenant, but was held to be extinguished by the prior union of the pieces in one party. At the suggestion of the counsel, however, the court conceded that the covenant gave equitable rights only. Still the mere question at issue was whether the covenant was an incumbrance on the title; and the court deciding that it was not, the rest was dictum. But in Nye v. Hoyle, 120 N. Y. 195, the decision in favor of the running of covenants was flat-footed. A and B owned adjoining lands with water-privileges, and finding it possible to better the condition of both, they covenanted to make a new water power on the land of B in which A was to have one-third and B two-thirds ownership; and A was to repair the part of the work on his land, while B repaired that on his. Also a piece of land was granted by B to A for a mill site. The lands descended and were assigned respectively to the plaintiff and the defendant. Part of the work was washed away, and the plaintiff repaired it all, seeking to recover the proportionate amount due him from the defendant. The court held that the covenants ran with the lands on both sides, and gave the plaintiff his money. Compare also Graves v. Deterling, 120 N. Y. 447.

In *Clement v. Burtis*, 121 N. Y. 708, a covenant not to erect any building that would be a nuisance was held a covenant whose burden ran with the land, although the court said it was no more than the law imposed upon every land owner anyway; so it was not fully decisive. While the decision does not so indicate, it would seem that there was something more in the covenant than could have been enforced without it, as it was covenanted not to erect a building to be used as a nuisance, and it may well be doubted whether equity would enjoin building anyway merely because an unlawful use was intended to be made of the building when it should be completed. But the question before the court was whether the covenant was an encumbrance, and that the court decided in the negative.

*Mott v. Oppenheimer*, 135 N. Y. 312, was another case of adjoining owners entering into a party-wall agreement, and the court restrained an assign from using the wall until he had paid his share, deciding very clearly that the covenant bound the land.

The lower courts in New York have been particularly free in holding that the burden of covenants runs with land, either for enforcement in equity or for suit at law. In *Countryman v. Deck*, 13 Abb. N. C. 110, a covenant to fence was enforced in equity. In *Stewart v. Aldrich*, 8 Hun 241, a party-wall agreement gave an action at law. And reference may be made to *Haynes v. B. N. Y. & P. Ry.*, 38 Hun 17; *Raynor v. Lyon*, 46 Hun 227; *Dey v. Prentice*, 90 Hun 27; *Guentzer v. Juch*, 4 N. Y. Supp. 39; *Mohr v. Parmalee*, 43 N. Y. Super. Ct. 320; *Trustees of Columbia College v. Lynch*, 47 How. Pr. 273; *Main v. Feather*, 21 Barb. 646; *Van Rensselaer v. Hayes*, 19 N. Y. 68; *Duffey v. N. Y. & H. Ry.*, 2 Hilton 496; *Wilcox v. Campbell*, 35 Hun 254; *Post v. West Shore Ry.*, 50 Hun 301; *Witherbee v. Meyer*, 84 Hun 146; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Dexter v. Beard*, 130 N. Y. 549. It is evident,



therefore, that there is not much doubt of the running of covenants in New York.

*Rhode Island*.—In *Green v. Creighton*, 7 R. I. 1, Halsey's heirs had deeded a strip of land to the City of Providence for a street, and covenanted and agreed not to build beyond eight feet of the line. The court held that this covenant ran to the assigns of the various heirs and burdened the land. See also *Thayer v. Smith*, 7 R. I. 164, as to the effect of a statute in Rhode Island that assigns, etc., under division fence agreements must carry out the burdens when the covenants are recorded.

*Vermont*.—An early decision in this state indicates a tendency to indorse the running of covenants. *Kellogg v. Robinson*, 6 Vt. 276, decided that a stipulation in a deed that a grantee should fence ran with the land. But there appears no other decision until *Clement v. Putnam*, 68 Vt. 285, where the running of restrictive covenants in equity was set forth. The law may be in some doubt therefore.

*Indiana*.—In *Carley v. Lewis*, 24 Indiana 23, the Indiana court first indorsed the running of burdens by holding that a covenant to pay rent would run with land. Then a somewhat contrary position was believed to be taken in *Bloch v. Isham*, 28 Ind. 37. There adjoining property owners had made a party-wall agreement; and one party having built the wall his assignee was not allowed to sue the assignee of the adjoining lot upon user, as the court held the covenant to pay merely personal. This case is cited by Washburn in his *Real Property* as supporting the proposition that such a party-wall agreement was merely personal, 2 Washburn *Real Prop.* 262-3; but on a rehearing of *Conduit v. Ross*, 102 Ind. 166, the state court considered that *Bloch v. Isham* merely decided that the benefit of that particular covenant did not run, while allowing that the burden of the covenant might run to the assignee. See also *Indianapolis Water Co. v. Nulte*, 126 Ind. 373.

*Hazlett v. Sinclair*, 76 Ind. 488, held that the burden of a covenant to maintain a fence inserted in a grant would run with the land, indicating that it amounted to an easement.<sup>1</sup> But in *Conduit v. Ross*, 102 Ind. 166, where Hauck and Ross, owners of adjoining lots had made a party-wall agreement, and Ross had built the wall which Hauck's assignee had used, it was held that the covenant was one which ran with the land and Ross was allowed damages at law for the assignee's refusing to pay his half the cost of the party-wall. This has probably settled the law in Indiana. See also *Lake Erie Ry. v. Priest*, 31 N. E. Rep. 77; *Toledo Ry. v. Cosand*, 33 N. E. Rep. 251; *Ry. v. Power*, 43 N. E. Rep. 959; *Midland Ry. v. Fiss*, 125 Ind. 19, all covenants to fence.

*Illinois*.—*Steele v. Biggs*, 22 Ill. 643, contained a covenant by the grantee for himself and assigns to pay for the land granted him, and the court seem to have thought that such a covenant would run. But there was a clear holding in *Dorsey v. St. L., A. & T. H. Ry.*, 58 Ill. 65, that the burden of the covenant ran with the land and might be sued on at law. The covenant was a grantee's agreement to fence, but the court discussed the running of covenants from their rise in warranties, with a clear indorsement of the running.

The more recent case of *Fitch v. Johnson*, 104 Ill. 111, was a covenant to repair a dam by a grantor of a mill and water rights, and the court held that the burden of the covenant was meant to run and must be allowed. The position was assumed in the face of the great general doubt on the question. So in *Gibson v. Holden*, 115 Ill. 199, the theory was again indorsed though the facts did not involve a de-

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<sup>1</sup> It will be noted that this easement was granted by the grantee, and so differs from the same easement in *Bronson v. Coffin*; so that it must have operated as a grant back. Query whether such a thing was possible until the title to the land had been received. The case of easements of necessity, where there has been but one instrument, is believed to be an exception to the general law.

cision. Decisions supported the running of party-wall agreements in *Roche v. Ullman*, 104 Ill. 11, and in *Tomblin v. Fish*, 18 Bradwell 439.

*Wisconsin*.—*Wooliscroft v. Norton*, 15 Wis. 198, is a clear decision that the burden of covenants will run with the land. A owned land and a waterpower. He sold a mill site, the grantee covenanting to pay a proportionate share in repairing the dam. The defendant, being the eventual assignee, was sued at law for his share of repairs, and the court held that the covenant was incident to the land and bound those to whom the land subsequently might pass.

Next *Pierce v. Kneeland*, 16 Wis. 672, held that a covenant in a mortgage that the mortgagor will pay solicitors' fees binds the equity in the hands of a purchaser. Then in *Hartung v. Witte*, 59 Wis. 285, a covenant by a grantee to maintain a fence was held to bind a successor, though the court was sufficiently under the influence of *Spencer's Case* to hold that a covenant to build a fence—an erection not then on the land—would not run without express mention of assigns. So in *Crawford v. Witherbee*, 77 Wis. 419, where A sold to the plaintiff a share in the minerals in a piece of land and covenanted to raise the minerals, it was held that the burden of the covenant fell upon the defendant, A's assignee.

*Maryland*.—In *Green v. Canby*, 24 Md. 127, a mortgagor's covenant for himself and assigns to pay the debt was held not to subject an assign to liability to an action of covenant, as the covenant was considered merely personal, but the court said that a covenant which affects the quality and mode of enjoyment of land might run with it. The court did not clearly carry out this promise however; for when it was attempted to enforce in equity against an assignee a grantee's covenant, it was held that an assignee could not be bound without privity of estate, but that restrictive covenants might be enforced where there was notice. *Lynn v. Mt. Savage*

Iron Co., 34 Md. 603. Accordingly in *Halle v. Newbold*, 69 Md. 265, it was held that a grantee's covenant that buildings of only a particular quality should be erected on the land, was a restriction binding upon those receiving with notice, and an incumbrance on the land. But *Baltimore v. White*, 62 Md. 362, decided that covenants in a deed of partition that the parties and their successors should have ingress through certain alleys ran with the land, though they might well have been regarded as easements anyway.

*Georgia.*—The burden of covenants seems clearly to run in Georgia. In *Howard Mnfg. Co. v. Water Lot Co.*, 53 Ga. 689, there were covenants to restrict a building line and to bear a share of repairing a dam; and the court admitted that they ran with the land; while in *Georgia Southern Ry. v. Reeves*, 64 Ga. 492, a covenant by the grantee to build a depot on a strip of land granted was held to bind the grantee's assign.

*North Carolina.*—In *Norfleet v. Cromwell*, 64 N. C. 1, there had been a grant of an easement for the use of a canal, the grantor covenanting to share in the repairs. The court held that the duty to repair was contingent upon the development of a necessity for it, and the defendant, an assignee, having renounced this contingent liability, was entitled to notice before action was brought against him. But the opinion discusses the running of the burden of covenants, and concludes that the distinction of Lord Brougham in *Keppell v. Bailey* and the view of the learned editor of *Spencer's Case* in *Smith's Leading Cases*, are not sound, and that burdens should run with the land. The learned judge limits his conclusion, however, to cases "where the intent to create an easement [the grant] is clear, where the easement is apparent, and where the covenant is consistent with public policy, and so qualifies or regulates the mode of enjoying the easement, that if it be disregarded, the easement created will be substantially different from that intended."

There has been no further discussion of the matter in North Carolina, although in *Raby v. Reeves*, 112 N. C. 688, the benefit of a covenant to pay rent was allowed to run to an assignee without indication that the running of covenants was confined to benefits.

*California*.—In *Weil v. Baldwin*, 64 Cal. 476, A sold to the plaintiff a ditch to a reservoir on A's land, and they made an indenture setting out the premises. The defendant took A's land and sought to prevent the plaintiff from entering the land. The parties had called the transfer to the plaintiff of the ditch a sale, but the court held it a covenant running with A's land, without admitting a sale of any interest. But however clear the correctness of the decision may have been on the facts, the court committed itself to the position of covenants running as burdens. So in *Fresno Canal Co. v. Dunbar*, 80 Cal. 530, where the grantee of a right from a water company covenanted to pay rent, the court held that the covenant bound the land as a lien, though it did not personally bind the assignee. And in *Bean v. Stoneman*, 104 Cal. 49, a covenant in a grant of land to allow water to run to the land granted through other land of the grantor, was held to bind that other land in the hands of the successor of the covenantor.

*Tennessee*.—In *Brew v. VanDeman*, 6 Heiskell, 433, a covenant in a grant to leave a way open was enforced as an easement against assigns.

*Kentucky*.—The court in *Hatcher v. Andrews*, 5 Bush 561, held that a covenant not to sell liquor on the land in question was an encumbrance which would bind an eventual vendee, and allow him to sue on a covenant for title. So in *Ky. Central Ry. v. Kenney*, 82 Ky. 154, a statement in an indenture passing land, evidently intended to have the effect of a covenant to fence, was held to bind successors in title. Then in *Gibson v. Porter*, 15 S. W. Rep. 871, an exception

of a road was enforced as an easement or covenant running with the land.

*Minnesota.*—*Miller v. Mendenhall*, 43 Minn. 95, decided that the burden of a covenant in a deed would run, but the opinion was affected by the fact of notice of the covenant having been given to the assignee. It appears from *Pillsbury v. Morris*, 54 Minn. 492, however, that a party-wall agreement runs as a charge upon land, so that it is possible that the law in Minnesota will indorse the full running of burdens.

*Alabama.*—In *Robbins v. Webb*, 68 Ala. 393, a restrictive covenant was held to run with land and to be enforceable in equity; but in *Gilmer v. Mobile & Montgomery Ry.*, 79 Ala. 569, the court delivered an elaborate opinion holding that the burden of covenants can run at law. There was a grant of land to the defendant's assignor for a right of way, and the grantee covenanted to erect a station on the land. The grantor reserved the right to cultivate the land, which the court thought an easement. This was held sufficient privity of estate to fulfill the requirement of privity and the court held the defendant liable on the covenant to build a station. The distinction between the running of benefits and the running of burdens was repudiated. This case was affirmed in 85 Ala. 422. Compare also *McMahon v. Williams*, 79 Ala. 288, where a restrictive covenant was enforced as a legal easement.

*Mississippi.*—*Kansas.*—In *Carson v. Percy*, 57 Miss. 97, and in *Martin v. Martin*, 44 Kan. 295, the burdens of covenants to perform active services were enforced in equity, the Mississippi case being a covenant to allow more land upon which a wharf might be extended when the formerly used ground should cave in; and the Kansas case being a covenant to render sustenance and support to the grantor.

*West Virginia.*—The court in this state first broadly indorsed the running of burdens in *Lydick v. B. & O. Ry.*, 17

W. Va. 427, though the case did not require a decision upon the point, but later in *W. Va. Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, the court seemed to take the opposite view, that the burden of a covenant would not run; but again the case went off upon a different point.

*Iowa*.—In *Peden v. Chi., Rock Isl. & Pac. Ry.*, 78 Iowa 131, it was held that a covenant by a railway company on receiving land, that water should be kept out from other land of the grantor, ran with the land against the covenantor's assigns so as to hold the defendant liable for failure of performance. Compare *Peden v. Same*, 83 Iowa 328.

*Nevada*.—In *Wheeler v. Schad*, 7 Nev. 204, the burden of a covenant to share the expenses of repairs of a mill-dam was held not to run, for the reason that it was made too long after the grant of land for it to be one transaction. There is little doubt, therefore, that in a proper case, the burden of covenants will run in Nevada.

*Missouri*.—Exactly what is the Missouri law may be doubted. In *Wiggins Ferry Co. v. Chi. & Alton Ry. Co.*, 73 Mo. 389, the plaintiff had covenanted with the defendant's assignor, the assignment to defendant being in contemplation, and the covenant expressly to be binding on the defendant. The court held that the defendant could not be bound by the covenant as a running burden, but was liable at law on the contemplated obligation. (See p. 190.) In *Huling v. Chester*, 19 Mo. App. 607, on the other hand, the burden of a party-wall agreement between adjoining landholders was held to run against an assignee. The position of the appellate court that a covenant can run at law was reiterated in *Poage v. Wabash Ry.*, 24 Mo. App. 199; and compare *Miller v. Noonan*, 12 Mo. App. 370. But in *Sharp v. Cheatham*, 88 Mo. 498, the Supreme Court again held that the burden of covenants would not run at law so as to enforce a party-wall agreement. It was enforceable in equity, however; as was

similarly held of restrictive covenants in *Coughlin v. Barker*, 46 Mo. App. 54.

In *Hilton v. Ry.*, 25 Mo. App. 322, the agreement to furnish a pass for life of the grantor to a railway of right of way was held not to bind a purchaser of the railway at mortgage sale.

*Colorado*.—In a recent case, *Hottell v. Farmers' Protective Assn.*, 53 Pac. Rep. 327, the Colorado Supreme Court held that the burden of a covenant by the grantor of a grain elevator and water power that the grantor would not use the water for the purpose of running a mill on the reserved land unless there was enough for the grantee also, ran with the land and bound the assign of the covenantor.

*Ohio*.—In three states the law is settled that the burden of covenants will not be enforced out of equity. But of these Ohio holds that in equity relief is not confined to restrictive covenants. In *Mithoff v. Hughes*, 5 Ohio Circ. Ct. 120, the burden of a party-wall agreement was enforced in equity; and in *Ry. v. Bosworth*, 46 O. St. 81, a covenant to fence was said to be unenforceable against an assignee except in equity, although the case was merely the refusal to allow action at law. Compare also *Hickey v. Ry.*, 36 N. E. Rep. 672; *Walsh v. Barton*, 24 Ohio St. 28; *Hall v. Geyer*, 14 O. C. C. 229. And in *Goudy v. Goudy*, Wright 410, a covenant by a son to render his father support, inserted in the deed passing the land to the son, was held to charge the land in the hands of the son's heirs.

*New Jersey*.—It is probably the law in New Jersey that the burden of covenants will not run at law. The question has never been decided precisely in an action at law, but the language in several cases, and the common custom to sue in equity in that state, seem to indicate that there is not much room to doubt the condition of the law. In *National Bank of Dover v. Segur*, 39 N. J. L. 173, the court allowed the benefit of a covenant to run because it was a benefit; and in



*Brewer v. Marshall*, 18 N. J. Eq. 337, same case, 19 N. J. Eq. 537, the court refused to allow the burden of a covenant to be enforced in equity as a burden enforceable against the assignee personally. It is probable, moreover, that the court, relying upon the customary soundness of the English decisions has confined its remedies to cases of restrictive covenants. *Coudert v. Sayre*, 19 Atl. Rep. 190; *DeGray v. Monmouth Beach Clubhouse Co.*, 15 N. J. Eq. 329.

*Virginia*.—In *Tardy v. Creasy*, 81 Va. 553, the court refused to enforce in equity a restrictive covenant against all business, on the ground that it was in restraint of trade; but they clearly expressed the opinion that no pure covenant could be made to run at law, so that Virginia may be considered in accord with English law.

It is seen then that the American law may probably be stated as allowing the burden of covenants to run with the land; and in the previous chapters it has been attempted to prove that such a condition of the law is not historically incorrect. But it is suggested that most of the American cases sustaining the Common Law running of burdens can be distributed under two or three heads, and that these are little more than the legal recognition of equitable charges; so that it would be stretching the law to say that burdens of covenants generally can run where they are properly created and concern the land. This requires some investigation. One class of cases involves covenants to pay ground rents,—chiefly Pennsylvania cases. These rents, of course, could have been granted rights and are a charge upon the land; so admittedly it will not do to place too much reliance upon the enforcement of the collection of the rent by actions of covenant. Another class of cases involves covenants to fence; and if there was such a thing as a spurious easement imposing the burden of fencing, those cases are eliminated. Still another class of cases involves party-wall agreements; and these, it is argued, are charges upon the land, which, though hardly

assignable to any particular Common Law right, may nevertheless be called an illogical exception to Common Law principles in so far as they are enforced at law, and so should not be taken as ground for saying that covenants generally can run. Covenants to allow streets, like *Dailey v. Beck*, 4 Clark 58; covenants to repair dams, like *Horne v. Miller*, 136 Pa. 640; covenants to allow profits, like *Morse v. Aldrich*, 19 Pick. 449; covenants to pay fees, like *Peirce v. Kneeland*, 16 Wis. 672; covenants to furnish more land, like *Carson v. Percy*, 57 Miss. 97,—in short, any covenant amounting to an obligation to furnish money for a purpose which will benefit the other land, are embraced in the class of cases which involve charges upon the land, like the party-wall agreements.

In discussing the running benefits it was shown how difficult it is to evolve a sound theory by which these last charges, granting that they are equitable charges upon the land, can be enforced on principle at Common Law; so it will have to be admitted that if the burdens of covenants do not run generally, these cases constitute an anomalous exception to Common Law principles.

But the reasoning of none of these classes of American cases thus eliminated is based upon any idea that burdens of covenants cannot run as legal obligations, as may be seen from the general abstracts of the cases given in the preceding pages; so if these covenants run for some special reason, and if the general doctrine is to be abandoned, that special reason must appear from older law than the American judges seem to have taken for their premises. But the first part of this essay was devoted to proving that there was no settled old law which would prove that the burdens of covenants could not generally run with land; indeed, it was attempted to prove the affirmative that burdens could generally run with land, and it is not necessary here to rehearse the premises by which the conclusion was reached. It would therefore appear that even if the American cases could all be classified as

equitable charges upon the burdened land enforced by actions at law, there is not sufficient ground to say that they are enforced as anomalies, and to deny that they are mere Common Law covenants which from time immemorial have run with land as Common Law rights.

But in fact the basis for the law of covenants is even stronger than this. By examination of the American cases it appears that they are not all readily classified under rents, easements of fencing, and charges upon the land involving the obligation to sustain an outlay of money. A large proportion of them involve obligations which cannot be explained as money charges upon the land. Thus in *Bald Eagle Valley Ry. Co. v. Nittany Valley Ry. Co.*, 171 Pa. 284, the covenant was to give all the traffic of a land company to a particular railway. In *Avery v. Ry. Co.*, 106 N. Y. 142, the obligation was to leave an opening in a fence. *Halle v. Newbold*, 69 Md. 265, involved a covenant as to the particular sort of building to go upon the land. *Gilmer v. Ry. Co.*, 79 Ala. 569, enforced a covenant by the company to put a station on the land in question. And the mind at once recurs to the numerous cases involving restriction as to the use of land, such as refraining from the sale of liquors, or agreements not to set a house beyond a fixed line. Restrictive covenants have found escape from the general question through the modern English doctrine of "equitable easements," and will be discussed in a future chapter, but the other covenants can certainly not be called easements in any sense, as they are not passive; so they must confirm the conclusion that in America generally the burden of covenants can run with land, as a pure Common Law right.

But the English and the American conditions of the law, contradictory as they seem to be, have not yet been contrasted under a consideration of the practical advantages that attach to the one or the other. If the English law is really the wisest for present use, then there should be no remonstrance

against its adoption in an undecided jurisdiction, even though it might be thought historically incorrect. And if it can be clearly proven the wisest, there might be good reason to attempt to set aside the common American law in jurisdictions where that has become well nigh settled. But if the American law has the more to recommend it, to those believing it nearer sound historically there will be greater satisfaction in seeing it extended over new jurisdictions; while if it is not clearly unwise it will be nevertheless with great hesitancy that it is attacked where it seems now accepted.

The wisdom of the English law was first maintained by Lord Brougham in *Keppell v. Bailey*, where he noted the undesirability of encumbering titles so as to impede their ready transfer. The tendency of modern times has been to relieve landed property of any bonds which restrict its transferability. Thus the principle of the rule against perpetuities is the restriction upon the rise of future interests, to occur at some unsettled future time, and thus tending to impair the freedom of title. So the rules against unreasonable and impossible conditions which would tend to create forfeitures subsequent to the vesting of estates. And so especially is to be remembered the impossibility in England of putting restraints upon alienation generally, so as to limit a man's responsibility for his indebtedness. The early recognition of fines and recoveries to avert the inability to alienate estates-tail militated in the same direction; and the never-to-be-forgotten Statute of Uses, instituted to avert the accumulation of estates not transferable and not attackable by the consent of the real owners themselves.

Another reason assigned by Lord Brougham, following really as a corollary from the former, is the unwisdom of allowing lands to fall upon innocent purchasers fraught with burdens, in many instances great, and throwing obligations upon the owner which he neither contracted for, nor was perhaps prepared to assume.

Of course such reasoning is strong, but it presents but one side of the question. It may be noted first that the rule against perpetuities and almost every evolution tending to the freedom of property, is a case where the restraint was imposed merely on the judgment or caprice of the owner who created it. It limits the estate for no creation of right to another estate. Those rules were invented against restraints which limit the usefulness of one holding without correspondingly enlarging the usefulness of another. Such is not the case with covenants. In short, while it is believed that a covenant running is not an easement, the recommendation for covenants and for easements would seem the same; and the arguments used against covenants have never brought the law of easements into disrepute. But covenants, moreover, do not present the same problem as other restraints upon the free use of property. When the usefulness of the covenant is over, its obligations fall at once into a dead letter. As an action at law the damages must in time adapt themselves to the nominal injury; and for an action in equity, the court may either resort to the interpretation of the covenant as being intended to end with its usefulness (see *Landell v. Hamilton*, 175 Pa. 327), or more scientifically, may refuse to command or enjoin where the enforcing of the order would be more equitable than the breach of the covenant. *Landell v. Hamilton*, 175 Pa. 327; (but cf. *Hills v. Miller*, 3 Paige 254); *Sayers v. Collyer*, 24 Ch. D. 180, 28 Ch. D. 103; *Knight v. Simmonds*, [1896], 2 Ch. 294, that the covenant will not be enforced if the purpose no longer survives.

The other point of Lord Brougham, though not so far-reaching, has more practical strength. If it be assumed that the burden runs without notice, then the purchaser, on being made liable to the covenant, has the sole resource of returning upon his grantor under his covenant against encumbrances. That the burden of such covenants is an encumbrance upon the title, it seems unreasonable to doubt, and

it has indeed been generally so accepted. *Snyder's License*, 2 Pa. Dist. Ct. 785; *Batley v. Foederer*, 3 Pa. Dist. Ct. 167; *Bronson v. Coffin*, 108 Mass. 175; *Raynor v. Lyon*, 46 Hun 227; *Mohr v. Parmalee*, 43 N. Y. Super. Ct. 320; *Fresno Canal Co. v. Dunbar*, 80 Cal. 530; *Harsha v. Reid*, 45 N. Y. 415; *Guentzer v. Juch*, 4 N. Y. Supp. 39; *Halle v. Newbold*, 69 Md. 265; *Jeffries v. Jeffries*, 117 Mass. 184; *Hatcher v. Andrews*, 5 Bush 561. In *Clement v. Burtis*, 121 N. Y. 708, apparently contra, the court held the covenant not to erect a nuisance was no burden, as it imposed no greater duty than the law imposed anyway.

But however this remedy may prove inefficient in particular cases, the English law is not without a parallel. In England, where there are no general laws for recording mortgages, the purchaser may buy land subject to similar burdens in utter ignorance of the obligation he has assumed. The chagrin in either case is the same, and there is no reason for the law to be different. The problem brings us back to the conclusion reached in the previous chapter in the discussion on proper parties. In every case the land is the debtor, and the only question is who shall be its surety, the grantor or the grantee.

But are there not positive advantages to be found in the running of covenants? It would seem that they are of inestimable value in apportioning, and regulating and insuring the proper use of land granted or retained. Nor can this always be attained by the mere auxiliary grant of an easement. Where a mill site is granted, and water rights added, how else than by covenants can the most convenient use be regulated? or the division of repairs at the proper time be insured to grantor and grantee? Consider the convenience of the covenant in the party-wall agreement to pay the proportionate cost of the wall upon user, without the necessity of resorting to any doctrine of quasi-contract to compel the proper remuneration for benefits gained. The universal ac-

ceptance of the permanence of restrictive covenants has showed the benefit to property in enforcing their burden.<sup>1</sup> But the vast number of active obligations to be imposed upon the covenantor, and falling without what are ordinarily classed as easements, gives testimony of the advantages to be gained by the wise exercise of their use; while the gradual development of the notion that they must touch or concern the land, may be and has been so easily handled that the opportunity for such covenants to be used as a sword is infrequent indeed. And we have seen how their operation, when their usefulness has ceased, may be so completely reduced as to render them practically nil—an advantage not so readily availed of in the case of granted easements.

Upon the whole, therefore, it is believed that the American law is probably right that the burden of covenants should run with the land; and in reaching this conclusion it is gratifying to feel that it follows the conclusion of that great English student of real property, Sir Edward Sugden, Lord St. Leonards, V. & P., 14 ed., p. 496.

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<sup>1</sup> It has not been thought to the point to include in this summing up of the reasons why the burdens of covenants in general should be allowed to run with land at law, the reasons set forth in the preface why covenants maintaining particular uses of property should be recognized as advantageous limitations upon the use of property. Such limitations are all restrictive covenants, and provided their binding effect is recognized, it is generally immaterial whether they are enforceable at law or are enforceable only in equity. The reasons here given are directed to support the running of those burdens, which not being in their nature restrictive, could not run if not recognized in law courts.

## CHAPTER VIII.

### THE PARTIES AFFECTED BY COVENANTS IN MODERN LAW; AND, INCIDENTALLY, OF THE EXTINGUISH- MENT OF COVENANTS.

It was shown in the chapter on the Origin of Covenants that they probably are derived from warranty, and that they are not a species of easement; so that they should run with land in the way that warranty ran, and should not be regarded as a part of the land to which they are attached, as easements are regarded as a part of the land. This conclusion was reached only as a result of investigating authorities, however, without attempting to supply the reasoning by which the early lawyers followed the analogy between covenants and warranties in working out effects. But now that the modern law has been examined, and it has been shown that in America at least this running covenant is still recognized, and that the benefits and burdens run with the land as in early law; it becomes necessary to take up again the question of the origin of covenants, whether in warranty or in easement, and this time to study the reasons which would lead to their having the effect of the one or the other, so as to see their effect in modern law. If covenants which run with land are derived from warranty, then it would be more satisfying to know how the analogy in their operation is to be worked out so as to affect mere privies in estate, and not merely prove that the weight of ancient and modern law has so established it.

This point was not involved in the study of leases, since the Statute of 32 Henry VIII expressly extends the effect



of covenants in leases to all subsequent holders, whether in privity of estate or not.

Unless these covenants are in the nature of easements, then, they run only by privity of estate. By privity of estate is meant succession by the assignee to the estate of his assignor.

Originally the word seems to have indicated privity in the creation of the estates with which the covenants were to run. It indicated the granting of land, being an assimilation to tenure; for before the Statute of Quia Emptores there was a privity of estate between every grantor and grantee. As a feature of subinfeudation the land might escheat to the grantor, and therefore he always possessed an interest in the land granted. There was thus a privity between the persons. This seems still the law in New York, where the Statute of Quia Emptores seems never to have been in effect. *Van Rensselaer v. Smith*, 27 Barb. 437. It is evidently this notion of privity which gave rise to the arguments that the grant of an easement would not be enough to make covenants to run with two estates, and so a fortiori that the covenant by a stranger could not run. And this notion of privity meaning the passing of land between the parties to the covenant has had many supporting decisions in America. *Hurd v. Curtis*, 19 Pick. 459, decided that there must be such a privity of estate between the covenanting parties; and the Maine Court held similarly in *Lyon v. Parker*, 45 Me. 474. Both these decisions quote Lord Kenyon's statement in *Webb v. Russell*, 3 T. R. 402, to that effect. It is apparent that such was the rise of the notion in England that the covenant would not run with rent as is shown by Lord Ellenborough in *Milnes v. Branch*, 5 M. & Sel. 411, where he said: "I do not see how the analogy, as regards covenants that run with the land, is to be applied unless it be shown that this is land. . . . The Stat. H. VIII recites that at Common Law, such only as are

parties or privies to any covenant can take advantage of it: here is neither privity of contract nor privity of estate; the rent is reserved out of the original estate."

But we shall see that the law now allows covenants to run with easements, and as the contrary was the mere accident in express warranty rather than the law, intention still being the operating element, it must be accepted that privity of estate now merely means succession to the estate to which the covenant attaches. But the succession to the estate must come by inheritance or assignment to the party who seeks to enforce the covenants; and whatever may have been the court's opinion in *Chudleigh's Case*, 1 Co. R. 122b, as explained by Mr. Justice Holmes (see H. C. L., p. 399), and whether that was based on *Pakenham's Case*, and whether *Pakenham's Case* was a misconception or not, the law now in England and America is that there must be this succession in estate. *Green v. Creighton*, 7 R. I. 1; *Winfield v. Henning*, 21 N. J. Eq. 188; *Waterbury v. Head*, 12 N. Y. St. Rep. 361 (also requiring privity between covenanting parties); *Woolescroft v. Norton*, 15 Wis. 198; *Ry. v. Bosworth*, 46 O. St. 81 (semble); *Wheeler v. Schad*, 7 Nev. 204; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Trustees of Columbia Col. v. Lynch*, 47 How. Pr. 273; *Kunckle v. Wynick*, 1 Dall. 305. In *Brew v. Vandeeman*, 6 Heisk 433; *Hills v. Miller*, 3 Paige 254; *Hazlett v. Sinclair*, 76 Ind. 488; and *Fresno Canal Co. v. Dunbar*, 80 Cal. 530, the courts pronounced the rights easements, although created by covenants; and so these decisions may appear contra; but they involved regular subjects of easements, namely, ways and in one case fencing. So not much can be drawn from them as to the necessity of privity in cases clearly involving covenants.

Privity has been discussed in connection with leases, as most of the cases have involved that subject; but the full breadth of the term may well be reiterated, as indicating that

all who accept the same estate are privies. Thus purchasers at mortgage sale, can enforce the covenants. See the cases involving Leases, and see also *King v. Dickeson*, 40 Ch. D. 596. And mortgagees, being supposed to take the title of the mortgagor, get the benefit of being privies in estate and can sue upon the covenants. *Bald Eagle Valley Ry. Co. v. Nittany Valley Ry. Co.*, 171 Pa. 284. So it would seem that privity of estate exists though the holder intended to buy a different title, and he can sue on the covenants; for in *Conrad v. Smith*, 5 W. N. C. 402, the purchaser at a tax sale was held to be bound by the covenant, unless the title he bought was better than that of the former owner.

How far the estate may be severed is not so important a question here as in the case of leases, for the question seems hardly ever to have arisen in connection with fee estates. In several instances lessees as assigns of partial interests have enforced benefits of covenants which would run to the owner of the fee, and have generally sued in their own names; but as the covenant is really the right of the owner of the fee, and as we have seen from the early law that the lessee for years is the mere holder of his reversioner's title, the proper way would seem to be for a lessee for years to sue in the name of the fee owner. This was done in one case, *Carson v. Percy*, 57 Miss. 97. In Equity, however, the person really at interest could bring the bill, and the English Cases where the lessee sued in his own name were all in equity.

Where the land is severed, the intention must determine whether the covenant went to all the estates or not. Thus in *Peden v. Ry.*, 78 Ia. 131, the benefit of a covenant to keep water from land, was held to run to the vendees of each part of the land. And in *Bronson v. Coffin*, 108 Mass. 175, the burden of a covenant to fence, ran only to that part of the land where the fence ran. See also *Walsh v. Barton*, 24 O. St. 28. Party-wall covenants and building restrictions, when instituted by land companies, always run of course to

vendees of the various lots, which are in fact the result of severing; but it was necessary to prove an intention that the covenant should run in *Dana v. Wentworth*, 111 Mass. 291.

So far as the benefit of covenants is concerned, then, the fact and its reason are thus demonstrated that the running is probably confined to heirs or assignees in privity of estate. But as to the burden more examination is necessary.

If this covenant binds the land, as has been so repeatedly said, and if the land is primarily liable, why is not the covenant the same as something granted out of the land, so as to affect it in every one's hands, whether in privity or not? The question is rudimental, and for an answer it is necessary to go back a little. It has been seen to be probably true that the heir was held bound by a sale and a warranty merely because the ancestor wished it so, and so by a mixture of cause and effect the warranty was held to bind the land. Bracton says that it bound the land, and this must have continued law, because we have seen that the younger sons in gavelkind inheritance could be vouched to their inheritances, though the Common Law warranty fell only on the eldest son. This was all evidently the outcome of confusion and no notion of charge on the conscience, because very much later clear trusts did not bind the conscience of a purchaser with notice. *Anon*, Keilway, 46 B. pl. 5; *Anon*, note Brooke, N. C., March Tr., pl. 95; nor did they bind the heir of a trustee. Y. B. 8 Ed. IV, 6. And see Ames' *Cases on Trusts*, 2d ed., p. 282, et seq.; 345 et seq. But Bracton wrote all this before the Statute of *Quia Emptores*, so subinfeudation still existed. Therefore the lord by escheat whom Bracton thought bound, was probably not the lord of the whole seniory, but only a higher tenant, himself, and as the tenant held of him after the escheat it was not unreasonable that the tenant's rights should not be prejudiced.<sup>1</sup> And the

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<sup>1</sup> Compare Pol. & Mait., Vol. 1, p. 261, that on the escheat of the feud a subtenant's burdens were not increased.

same would be true of the lord's assign if he was assign of the seniory, and not assign merely of other parts of the land,<sup>1</sup> for then the assign would be in the same position as the former lord. But the law did not then make nice distinctions, and if the warranty bound in the one case, it might well bind in the other. And hence the heir in gavel-kind who held land must hand it over as having been part of the estate from which the covenantee's land was cut.

There is, however, a great difference between these cases and that of a disseisor. The law of warranty, however twisted about, is always a law of contract based upon a personal relation, while a disseisor is a mere deforcer who assumes or acknowledges no obligations. That the tenant who has suffered by a disseisor's entrance upon the land, should have claims against the disseisor is just enough, and in the modern days of equity, there would be no doubt that he would get his rights, but not on a Common Law principle. The man who has a claim on land for a warranty would certainly not be better off than the owner of a rent charge out of the land. If the latter is disseised of his rent, he must resort to such measures as the law allows to regain his so-called possession of it, for he no longer has a claim on the thing, but a mere chose in action. In this, however, even the owner of a rent, is better off than the warrantee. For granted that the warrantee has no longer a claim on the land, he has nothing unless it is the right to have his warrantor first eject the disseisor and then turn over part of the bound land.

There appears to be no case of warranty enforced against a disseisor, and as the situation must have occurred, the absence of litigation must point to the common opinion that the disseisor was not bound. If covenants, then, run only by analogy to warranties the law must be accepted as probably

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<sup>1</sup> That a whole estate might be assigned before *Quia Emp.* See *Pol. & Mait. Hist. Eng. Law*, Vol. 1, p. 310 et seq.

correct in its assumption that privity of estate is necessary on both sides of the covenant, and only successors in title are bound by their obligations.

But even a greater difficulty arises in the question how far the burden of the covenant is a personal obligation, to be entirely fulfilled irrespective of the value of the land. The early warranty perhaps bound the heir whether he had assets or not;—Blackstone says because it was assumed that the ancestor would not die without leaving some assets.<sup>1</sup> But whether that be true or not, it became law very early that the heir was bound only to the extent of land descended, whether the particular charged land, or other land from the warranting ancestor. At any rate lands obtained from other sources needed not be used;<sup>2</sup> and there is no doubt that such was the later law. If, therefore, covenant is to be enforced by analogy to warranty, how can it be enforced against assigns as a personal claim unlimited by the value of the land? Or if enforced as such a personal claim, how can we say that is founded upon warranty? The answer must rest on two points, however their soundness is to be attacked. First, the restriction of the liability in warranty must have rested on the predominance of the idea in later days that warranty was a mere action to enforce a claim on particular land and for damages, and the sense of justice rebelled at holding a successor to more than he received. The Statutes DeBigamis and Gloucester we have seen were based on the abuse of the personal character of warranty, a character which in particular cases they destroyed; so though warranty may have been long regarded as only a lien ordinarily, as Bracton's citation from 3 H. III would indicate (Cf. Bract. f. 387b), yet warranty may not always have been so limited. But secondly, it must be remembered that the law of cove-

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<sup>1</sup> 2 Bl. Com. 301, Co. Lit. 373, Lit. 709.

<sup>2</sup> Bracton 394b, citing Martin Pateshull's Case, 3 H. III, and see *supra*, p. 40, for the established later law in accord.

nants probably arose before the personal nature of the contract of warranty fell out of sight, so when their analogy to the covenant of warranty caused other covenants to run with land those other covenants may have been treated as running personal obligations because a covenant was a personal obligation, although voucher to warranty and therefore covenant for warranty had become in practice a real and not a personal action. This seems the only way to explain why covenants running with land should carry obligations giving a broader right than a mere right in rem. But in *Fresno Canal Co. v. Dunbar*, 80 Cal. 530, the court held that the burden of a covenant could not so run as to make an assign personally liable, but constituted a lien upon the land which could be foreclosed. The word "lien," however, is often very loosely used on account of the frequency of statutory claims termed liens; and as there is no such thing as a lien upon land in the Common Law, the claim referred to must be an indorsement of the limitation of covenants in accord with the law of warranty to the amount of assets received. While it is believed that this is the only case<sup>1</sup> taking this position, it is remembered that the number of covenants is very small which could involve by breach a damage greater than the value of the property, so the point may not have been often considered.

In *Guentzer v. Juch*, 4 N. Y. Supp. 39, the court made reference to the point in enforcing a party-wall agreement and held that the property was primarily liable, though the

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<sup>1</sup> In *Mott v. Oppenheimer*, 135 N. Y. 312, in enforcing a party-wall agreement, the court say: "Either the agreement was a common law obligation, personally enforceable by ordinary action, or it was an instrument which impressed with a lien the lands affected. In either case the right to use the wall was absolutely granted and the obligation to pay the value of the one half upon the premises adjacent to those of the builder of the wall, when it was availed of, if not personally assumed by the adjacent property owner, was enforceable against his land."

defendant, an eventual assignee, was personally liable for the deficiency. So in *Fisher's Executors v. Lewis*, 1 Clark 422, where the assignee of land charged with a ground rent had reassigned the land to avoid liability from an impending action, the court held him liable, saying that the defendant could not in that way relieve himself of a responsibility already vested, else a secret assignment to an insolvent would free him entirely. See also *Hurley v. King*, 2 C. M. & R. 18.

It will always be noted, however, that the intention of the parties is to make the land primarily liable, and the holder is merely in the position of a surety. If therefore in *Fisher v. Lewis* the assignor is compelled to pay the amount of damages on the covenant, he should have his action over against the holder of the land. For a fuller discussion of this theory, reference may be had to the chapter on leases, as in that connection more cases have occurred. It will be noted, however, that the decision in *Fisher v. Lewis* rests not on the notion of any personal warranty of the land after assignment, but upon a supposed fraudulent avoidance of responsibility accomplished by getting rid of the land. It was assumed there, just as it has been assumed all along, that the liability was not one of contract between the various assignees, but a Common Law liability appended to the possession of the land and ceasing so far as the duty to the covenantee is concerned the moment the property passes. The doctrine of the case, then, is to regard the transfer as void on account of fraud, but fraud not on one of the parties to the transfer, but fraud upon the covenantee, who is supposed, however, still to have an action against the original covenantor as well as against the holder of the property at the time of action brought.<sup>1</sup>

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<sup>1</sup> It seems difficult to discern any fraud in an assignee relieving himself of a burden which came to him merely as holder of the land. *Journay v. Brackley*, 1 Hilton 447; *Johnson v. Sherman*, 15 Cal.



Of course if a right of action accrues while one person holds the property, this right is not lost against him by his assigning it over again, as it then becomes his personal obligation aside from his proprietorship of the land. Thus in *Pfeiffer v. Matthews*, 161 Mass. 487, where the plaintiff, and A, had made a party-wall agreement, and the plaintiff had built, A having assigned to the defendant and the defendant to B, who built and then reassigned to the defendant, again taking it back subject to a mortgage, the court held the defendant not liable, but B who had used the wall.

In *Lydick v. Balto. & Ohio Ry.*, 17 W. Va. 427, the interesting theory was laid down that covenants were negotiable and were not affected by equities. See also *Suydam v. Jones*, 10 Wend. 180. Of course there is no legal connection between notes or bills and covenants, but the similarity in the nature of each is at least striking. The right of each new assignee of the covenantee is not the assignment of a right, but is a new right arising from the nature of the obligation; and of course, therefore, it is not barred by equities. That they are negotiable, however, is not the proper way to state it, for they are not until broken in the slightest degree assignable apart from the land.

But the idea may well be of assistance in solving other questions in the law of covenants which especially simulate bills of exchange. For instance, a covenant is extinguished by the union of the covenantor and the covenantee in the same person owning the land. See *Post v. Weil*, 115 N. Y. 361; *Waterbury v. Head*, 12 N. Y. St. Reporter 361. But the question is different where the covenantee has assigned all or even part of the property for whose benefit the cove-

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287 (lease cases); although the English Courts seem to have indicated a different opinion, *Fagg v. Dobie*, 3 Y. & C. 96; *Hurley v. King*, 2 C. M. & R. 18. It is very clear, however, that the assignee must transfer the title into some one else; he cannot by an attempt at mere abandonment divest himself of liability. *Bonetti v. Treat*, 91 Cal. 223.

nant is made; as then the covenant is not extinguished though he regain the property burdened by the covenant. Thus in *Raynor v. Lyon*, 46 Hun 227, A had owned land and sold part in lots to B who covenanted not to erect upon it buildings of a certain sort. Later A bought back those lots and reconveyed them. On the question in equity whether the lots were encumbered by the covenant, the court held that they were, as the covenants were exacted as well for the benefit of other lots sold since as for the part retained by A; and though these lots were regained, he could not release those covenants. But in *Keats v. Lyon*, L. R. 4 Ch. 218, under what appear to be exactly the same facts the English Court of Appeal in Chancery came to the opposite conclusion, not, however, rejecting the principles. They hold that the running of the covenant's benefits depends upon the intention of the original contracting parties, and under all the circumstances they concluded that it was not intended to run. That this conclusion rests rather upon a posteriori developments than anything else is suggestive that it may eventually lead to a rigid construction of intention to that effect. "We think that an owner of land in the position in which Sharp stood in the year 1842 can not be presumed to have intended to fetter himself in the exercise of the power which he indisputably possessed of dealing with the whole of his estate as he thought fit; and as, notwithstanding the sale of some portions of land, his power of dealing with what he retained remained unaffected, it is, under the circumstances of this case, very difficult to see how any distinction is to be drawn between his power of dealing with the land so retained and with that which he resumed by the purchase from Langton; and if it were to be held that a mere conveyance of a small portion of the remaining land amounts to evidence of such an intention on the part of the vendor, the rule cannot be confined to conveyances in fee, but must be extended to alienation for life and years; and

the present case affords a remarkable instance of the inconvenience which would result from such a rule, for as there appear to have been some twenty conveyances of small pieces of land, the concurrence of all these purchasers, and of all persons claiming under them, would be necessary to any such arrangement as that which was affected in 1846; and as it would be extremely difficult if not impossible to obtain the concurrence of all those persons, the practical result would be to render a portion of the property inalienable except under very onerous and depreciating conditions."—Per Lord Justice Selwyn.

Perhaps the most interesting point, however, involved in this discussion is the one whether the covenant can be extinguished as to one piece of the property and remain still alive as to the rest. This question was not necessarily involved in either of the cases just presented, as the question there before the court was only whether the property was encumbered at all. Yet reference to the excerpt from Lord Justice Selwyn's opinion in *Keats v. Lyon* will show that he thought such a state of affairs was probable, as it would seem that the original vendor could release the covenant as running to the lands retained. The point goes to the essence of covenants, and requires a decision upon their nature. The covenant cannot be a single covenant with the first owner, for his partial assignee can enforce it while he has the same right left. And the assignee's right cannot be a new right created after the covenant is made, for that would change the contract.

Nor does it help matters to say that the covenant is one, and that the first owner is merely barred from suing, for that would be a personal defense, and in fact every successor of his after the extinguishment is likewise barred. That part of the covenant is clearly gone.

This, therefore, destroys the idea that covenants are negotiable, that is to say, that the nature of the instrument

is a new right arising to each assignee on the designation of the assignor. For aside from the utter lack of unity in origin between the law of warranty and the custom of merchants, the difficulty in hand presents itself. No bill can give two separate parties rights on the same obligation at once, and extinguishment for once is extinguishment for all time; whereas here one person's right is extinguished, completely, while another's is in full force.

One more supposition is left, that the covenant is an obligation to all future holders of the land, jointly or severally, and each future holder can sue on his separate obligation or extinguish it without affecting the right of his neighbor. Who those future holders shall be is to be designated by the original holder, and they have rights only if so intended. To this, however, at least two difficulties present themselves. First, the running of the burdens. As these cannot of course depend upon designation they must depend upon agency, and the impossibility of this was accepted as considered in the chapter on leases. Secondly, the designated parties might not arise for many years if there were no immediate new assignment, and therefore there would be nothing to hinder the covenantor from cancelling their share in the covenant; unless the extra contract be implied between him and the owner that he do not cancel the "running" of the covenant, and such an additional contract would make the assignee's means of enforcing the contract really the right of a beneficiary.

Upon the whole, therefore, it would seem that the principle must be a peculiarity of the Common Law explained only by analogy to warranty, and that in turn explained by the feudal relation.

It is possible that a limit to the running of some covenants may be found in the rule against perpetuities. Only some covenants are affected because the rule is considered as limiting only the future rise of hereditaments, and for the

covenant to be affected it must be something like a covenant to sell property back again. The question is hardly germane to this essay, and for a thorough investigation of the matter reference must be had to some work exclusively devoted to the working of that Rule;<sup>1</sup> but as this point has been brought up in two conspicuous English Cases, it would perhaps be amiss not to make some reference to them. In *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421, A, owning X and Y, sold coal in X to B and covenanted, naming heirs and assigns on both sides, to sell X to B if he ever sold Y to anyone else. B's assign seeks to enforce a specific performance of this covenant against A's assign, and it was allowed, the court holding that the right to obtain the land was not within the rule against perpetuities as all the parties by uniting might make a good title to the property, and so alienation was not restricted. But in *London & South Western Ry. v. Gomm*, 20 Ch. D. 562, where the covenant was that the grantee would resell on demand, both the divisional Court and the Court of Appeal disapproved the former decision on the ground that the rule against perpetuities was offended by the mere rise of the right in future beyond the proper time, and as that was the case in these covenants the covenant was void even though it need not be a hindrance to alienation. So it must be accepted that the English Law, and probably our own on the same interpretation of the rule, would hold that these covenants may sometimes be void on account of the rule against perpetuities.

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<sup>1</sup> See Gray, *Rule against Perpetuities*, sec. 330.

## CHAPTER IX.

### OF THE SEVERAL REQUIREMENTS OF COVENANTS.

Section 1. Of Seals, and the Running of Parole Agreements and Stipulations for the Grantees in Deeds-poll.

Sec. 2. Of the Necessity of a Grant between the Parties; and of the Separate Execution of the Covenant near the Time of Such Grant.

Sec. 3. Of the Character of the Grant, whether of Corporeal or Incorporeal Hereditaments.

Sec. 4. Of the Matter of Covenants.

Sec. 5. Of the Necessary Wording of Covenants and their Construction; and of the Naming of the Parties.

### SECTION 1.

#### OF SEALS, AND THE RUNNING OF PAROLE AGREEMENTS AND STIPULATIONS FOR GRANTEEES IN DEEDS-POLL.

As the obligation of covenant is one of very early origin it is not surprising to find it still law that a covenant must be under seal; and in this there is no difference between covenants in leases and covenants which run with larger estates. Exactly why agreements not under seal should not bind successors to the estate which they concern, and run like covenants, it is hard to say. When covenants were first instituted they were put under seal because all obligations were under seal, and they could not have bound even the agreeing parties without being so. But since the development of the law of simple contract, there is no occasion to seal what would bind the contracting parties anyway, unless it must be done to let the agreement run. The quality of running with land was earned for express warranties and covenants at a time when such obligations were naturally

under seal, and the custom survived the necessity until the custom has probably made the seal again a necessity, though now without a sound reason. It is well known that there was no necessity for putting a deed under seal except to preserve the warranties contained in it; but as formal warranties, which may have been peculiar obligations in requiring seals, gave way to covenants for title even before the simple contract was developed, there would seem no reason now why the land, the assurance of title, and any agreement concerning the enjoyment should not pass from party to party without need of a seal. "*Cessante ratione, cesset ipsa lex.*"

But the courts might well hesitate to make so radical a change in the law after centuries of custom; so at this day, it would be exceedingly risky to execute a covenant without putting it under seal. Moreover, it would seem that the agreement must be clearly undertaken by the covenantor and signed by him; so that the instrument must be ordinarily an indenture signed by the grantor of the property and the grantee if a covenantor. Yet some American cases have gone very far in enforcing stipulations in deeds-poll as effective covenants by the grantee. It is true that in most of these cases the courts said that the grantee by accepting the deed-poll which contained the stipulation, ratified it and became a party to the transaction; so that it is possible, though hardly probable, that the courts did not realize that they were enforcing merely a parole agreement, so far as the grantee was concerned.

It is hardly necessary to point out to the reader that the fact that the stipulation was in writing and not verbal, had nothing to do with whether it was technically a parole agreement. If an agreement is not sealed, it is parole, even though written out; the writing merely constitutes unchangeable evidence of what the agreement was. *Standen v. Christmas*, 10 Q. B. 135, for instance, discussed in the chapter

on leases, was recognized as involving a parole lease, even though the lease was written out—it was not sealed.

Of course it would make no difference between the grantor and the immediate grantee whether the latter was bound by a covenant which he signed, or by a stipulation in a deed-poll, the acceptance of which constituted a ratification of agreements; but the grantee's assign is another person entirely, and the general idea has always been that the grantee has no authority in law to bind future assignees by the mere acceptance or ratification of agreements without signing or sealing them. But let us examine these cases.

In *Countryman v. Deck*, 13 Abb. N. C. 110, A, owning land, sold part to the defendant's assignor, conveying by a deed-poll in which it was "provided always that the party of the second part should fence and keep fenced the premises above described." Both assigned, and the question was whether the grantor's assign could bring a bill for specific performance against the grantee's assign. The court held that the intention showed a covenant and that the covenant ran.

As the grantee did not sign the deed, his agreement was parole, and as his assign was not a party to that agreement we have just seen that the assign's being held to the performance of the covenant would seem to sustain the running of a parole agreement; for the action was to enforce performance, and not one by which his conscience might be charged on account of receiving undue advantages, subjecting him to refunding under a quasi-contract.

In *Wiggins Ferry Co. v. Chi. & Al. Ry. Co.*, 73 Mo. 389, the plaintiff granted with covenants to A Ry., the covenants to be binding on the defendant who was to be assignee from A Ry., of the property. The defendant then received by a deed stipulating that it should be bound. The court held that the covenant could not run with the land; but the defendant was bound because of the express contemplation that it should be



bound, and that contemplation implied a promise, the court thought. The action was at law for a breach of this promise. The court very apparently did not base the action upon the right of a third party to sue as beneficiary on the contract between A Ry. and the defendant; and as it was expressly held that the covenant did not run, it must have been held here that the defendant took the property with a charged conscience and became constructive trustee of the property. But instead of being proceeded against by a bill for a reconveyance of the property on account of his failure to carry out the trust, it was assumed that the defendant was unjustly enriched by its possession; so he was called upon to pay the value of the obligation, and this action was allowed at law.<sup>1</sup> It would seem that the case is authority for this. But such a conclusion would not allow the plaintiff to sue again for a renewed failure to carry out the agreement to fence.

In *Hickey v. Ry.*, 36 N. E. Rep. 672 (Ohio), the railway had conveyed land to the defendant by a deed-poll on condition that the owner should perpetually maintain fences. The defendant sold, and the assignee not having maintained the fence, the railway sued the defendant for the breach. This the court held could not be done, as the condition was that the "owner" should fence, and the defendant was no longer owner, but otherwise the deed-poll, on being accepted, bound to its condition.

Again this seems sound enough as between the original parties, but upon assignment it does not explain the liability of the assignee of the grantee, as he is not a party to the contract with the first grantor, and yet the grantor seeks to hold him to a contract obligation, not to the obligation of a condition.

In *Maine v. Cumston*, 98 Mass. 317, an action in contract was allowed against the assignee of land charged with a

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<sup>1</sup> Cf. *Martin v. Martin*, 44 Kan. 295, where the proceeding was in equity.

party-wall agreement in a deed-poll. The court here admitted that covenant could not be brought, but said that by the acceptance of a deed, the defendant "assumed the performance of the condition or stipulation, from which the law will imply a promise on which an action may be maintained." The action is either upon a contract implied between the plaintiff and the defendant directly, arising upon the use by the defendant of the plaintiff's wall; or more likely as the party-wall agreement imposed a fixed money charge upon the land, whether legal or equitable, the action is the enforcing at law of the fixed claim with which the defendant's conscience is charged in equity, just as any liquidated claim in equity may generally be collected by some action at law. It is, therefore, evident that wherever the original deed imposed upon the grantee who accepted it, a distinct charge, which is estimated all the time as a liquidated sum of money, due to another person, there is no difficulty in holding the person who accepts the deed to a knowledge of this charge, which would be good in equity; and any person who receives from him with such knowledge would likewise be bound, whether he ever signed the deed as grantee or not. Thus the agreement of a grantee to pay for the party-wall when he used it is only an equitable charge upon the land, of the value of half the party-wall, payable when the owner should make use of the wall. And so an injunction may be obtained on these agreements, restraining the defendant from building until he has paid for his share of the wall. *Lewis v. Gollner*, 129 N. Y. 227.

But when the original stipulation is to refrain from something, or is to do something, or is any sort of condition which may not constitute an equitable money charge upon the land to be discharged by one satisfaction, then, though the original grantee may be taken by his acceptance to imply a promise to comply, every subsequent holder is a stranger to the first contract, and if he is to be responsible to

the first grantor for the performance of the agreement, it must be upon the principle that a covenant can be created by parole and may run by parole, or there is no legal principle to subject him.

The loose reasoning by which the courts have enforced these stipulations is very difficult to analyze. They generally speak of the idea that the acceptance of deeds with conditions to do something binds the acceptor to the conditions or covenants; but if they do realize that they are enforcing parole agreements, they never explain how assignees from this grantee can be held to the creator of the conditions between whom no contract was either expressed or implied. If the courts were precise, the explanation offered would probably be either the equity notion that whatever was intended to be done should be taken to be done, or the more artistic, but hardly more satisfactory idea of the English courts, that these covenants are equitable easements or a sort of trust. The first assumes that the burden of a covenant can run at law; the latter does not assume that principle. Granting that the covenant could be made good at law by an indenture deed at first, then it is said that in equity it should be good anyway. Even this may well be doubted, so far as assignees are concerned, in cases of stipulations for services, for there is no principle of equity which will compel a person to perform any service for which he did not himself agree with the person who seeks to enforce the performance. But assuming that point, as in *Lydick v. B. & O. Ry.*, 17 W. Va. 427, and apparently in *Murray v. Jayne*, 8 Barb. 612, it was said that though a covenant may not be perfectly framed to run at law, yet if its nature is such that it can run, it will be enforced in equity; then by a general confusion of legal and equity jurisdiction, the covenant has been enforced as good at law. Of course, it is reasoning in a circle to say that since the covenant is good in equity, although imperfect at law, it shall be good at law because good

in equity, but some of the cases must have taken that position. *Countryman v. Deck*, and any condition to perform active services, clearly assumes that the covenant could be made good by the grantee's signature, as it was shown in earlier chapters that no active duty could be imposed upon successors to lands except by these covenants. *Countryman v. Deck*, however, was not a bill for a mandatory injunction, which would have been based entirely on equity obligation, but was a bill for specific performance which ordinarily is based upon the recognition of a complete contract at law. If this explanation of the running is not satisfactory, these stipulations for active services must recognize the running of parole covenants at law.

The other theory, the notion of the covenant being an easement or a trust, of course would not require a grantee with notice to sign the deed which bound him, if in fact the covenant or stipulation is an easement or trust. We have seen that this cannot explain active obligations, but whether it can explain passive obligations and restrictions depends upon the soundness of the notion of equitable easements, and that question had best wait until the chapter on that subject.

Stipulations and unsigned covenants have probably been enforced much more frequently than can be learned from the reports of the cases, although the reports may not indicate that the deeds have been deeds-poll; for nowadays deeds of indenture are very uncommon forms of conveyance, and it is hardly probable that the many American cases enforcing covenants have been all upon covenants signed by the grantee. But it appears from the reports that stipulations were in deeds-poll which were enforced against assigns in *Hurst v. Rodney*, 1 Wash. C. C. 375; *Ga. So. Ry. v. Reeves*, 64 Ga. 492; *Poage v. Wabash Ry.*, 24 Mo. App. 199; *Jeffries v. Jeffries*, 117 Mass. 184; *Midland Ry. v. Fisher*, 125 Ind. 19; *Lake Erie Ry. v. Priest*, 31 N. E. Rep. 77 (Ind.);

Post v. West Shore Ry., 50 Hun 301. And see Walsh v. Barton, 24 O. St. 28; Hall v. Geyer, 14 O. C. C. 229. Yet in Parish v. Whitney, 3 Gray 516, the notion of the running of such an agreement by the grantee of a deed-poll is thoroughly repudiated; and see Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.<sup>1</sup>

## SECTION 2.

### OF THE NECESSITY OF A GRANT BETWEEN THE PARTIES; AND OF THE SEPARATE EXECUTION OF THE COVENANT NEAR THE TIME OF SUCH GRANT.

It is next presented to consider whether or not the covenant must be embraced in a grant and rise in connection with some form of interest passing between the parties to the covenant, or whether a covenant can run although made with one who is a stranger, as he is called; that is to say, whether covenants by strangers to the title or to strangers to the title will run with a particular piece of land. It is clear that warranties after becoming fully developed were not made by strangers, as the relation of tenure was the express consideration of the warranty, and the question whether a stranger was bound could not arise. True enough after the artistic manipulation of the warranty as a rebutter against the heir's claim to inheritance was evolved as an avoidance of the various early statutes, the collateral warranty was really given without a conveyance of land; but that invention was on its face a fiction, the pretense being that this warrantor had conveyed the land warranted; and

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<sup>1</sup> In Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, cited above, the deed was apparently a deed-poll, although it contained express covenants by the grantee. But the attestation clause recited, "In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written." So the court held that the grantee evidently sealed the deed, and decided that his signature was not necessary at common law.

so the fiction was really his figuring as a grantor, from which relation alone his warranty could have run. It will be remembered, however, that the conclusion as to the running of express warranties reached above, was that the rights and the obligations ran largely because it was agreed that they should run, and not entirely because of the running of implied warranties. If that be so, then, why should not the agreement alone be enough to make a stranger's covenants run? It can only be answered that whatever might have been done with express warranties, they did follow implied warranties in this, that they were never made except in case of actual grants. And as covenants were the offspring of express warranties they would be expected to follow them closely. But it is claimed that as a matter of fact they did not so follow them, and as an instance of this *Pakenham's Case*, Y. B. 42 E. III, 3, is cited in support of this position.

That case has been discussed above, and need not be considered further here. It, indeed, seems probable that there was no grant between the parties, although Mr. Sugden thought that there was some relation of interest between them. But it is evident that the court was in very great doubt about the law, and if that doctrine was laid down it cannot be said that the discussion of it was very intelligible.

Nor is it to be thought that such a principle has much to recommend it. As it seems that these covenants can be used to assure larger rights than mere easements, it would allow the free creation of such duties utterly aloof from the equitable distribution of privileges which was thought to recommend them as an incident of grants. There would occur cases, of course, where their use would be of great advantage, but if the argument against all covenants running has any weight at all, it will certainly be respected to limit the operation to places where broad experiences only have revealed their usefulness, and instances have not been common

of the use of covenants by strangers. It is believed that *Pakenham's Case* has not been followed in this regard in England, unless *Horne's Case*, Y. B. 2 H. IV, 6, is such a case; although Coke said covenants of a stranger would run. Co. Lit. 384b.

In modern times it has become settled in England, as we shall see, that not even the grant of an easement is sufficient to allow an accompanying covenant to run; and a fortiori it is hopeless to expect the courts to indorse the running of the covenant by a mere stranger. But the Real Property Commissioners reported a recommendation that the matter be settled by statute. See Sugden, V. & P., p. 585.

The American Law is generally settled that the covenant without some sort of a grant is merely a personal obligation. *Hurd v. Curtis*, 19 Pick. 459; *Lyon v. Parker*, 45 Me. 474; *Gilmer v. Ry.*, 79 Ala. 569; *Hills v. Miller*, 3 Paige 254; *Nye v. Hoyle*, 120 N. Y. 195; *Denman v. Prince*, 40 Barb. 213; *Wheeler v. Schad*, 7 Nev. 204; *Harsha v. Reid*, 45 N. Y. 415; *Norfleet v. Cromwell*, 64 N. C. 1 (semble); *Lawrence v. Whitney*, 115 N. Y. 410; *Miller v. Noonan*, 12 Mo. App. 370, 83 Mo. 343; *Trustees of Col. College v. Lynch*, 47 How. Pr. 273. *Bradley v. Walker*, 14 N. Y. Supp. 315, if contra, would seem not law in New York. But compare *Horne v. Miller*, 136 Pa. 640.

In *Mott v. Oppenheimer*, 135 N. Y. 312, there was no grant, but there was a party-wall agreement by which either party might build and the other pay on user. Only one signed the agreement. The court said the fact that there was no grant was overcome by the agreement that the covenant should run. The action, however, was a petition to restrain the defendant from using until he should pay for his share of the wall.

In Minnesota the court held that the benefit of a covenant by a stranger might run. *Shaber v. St. Paul Water Co.*, 30 Minn. 179; and in an accompanying decision, *Hamm v.*

Same, *id.* 185. There was no careful discussion of the point, however.

But it is held not fatal that the covenant be expressed in a separate instrument contemporaneous with the grant, as the two instruments may be regarded as but one transaction. *Hills v. Miller*, 3 Paige 254; *Cutter v. Williams*, 3 Allen 196; *Denman v. Prince*, 40 Barb. 213; *Robbins v. Webb*, 68 Ala. 393; *Hayes v. N. Y. Gold Mining Co.*, 2 Col. 273. But in *Wheeler v. Schad*, 7 Nev. 204, an intermission of eleven days between the grant and the covenant was held too great to regard the two as one transaction, and the covenant did not run.

### SECTION 3.

#### OF THE CHARACTER OF THE GRANT, WHETHER OF CORPOREAL OR INCORPOREAL HEREDITAMENTS.

Conceding, then, that the covenant must accompany a grant in order to run, the next question is what must be the nature of the estate conveyed in order to pass the title. Historically, so far as warranties were concerned, the expectation would be that the tenement granted must be corporeal. In the old status of tenure that was of course the case, and it was so in the exercise of express warranties. But there seems to be no reason why some incorporeal hereditaments, as rents or profits, could not be warranted, after the warranty became developed as an insurance of full enjoyment; and if that be so, then why should not covenants run with them?

Moreover, as the covenants run entirely by analogy, anyway, the requirement of a grant would seem satisfied by the grant of an easement as well as by the grant of a fee. Any tendency it has to broaden the operation of covenants to a dangerous degree is answered by the fact that the grants of easements have been generally so used in America as to make it evident that it is useful to have covenants run with



them; and as a great many decisions have drifted that way, especially in cases on party-wall agreements, there would seem little ground to discourage it in any American jurisdiction.

The English Law, however, has become settled otherwise, and as in any new jurisdiction English cases are sure to be presented and argued from, it is very important for every lawyer to be familiar with them from the beginning. In *Brewster v. Kidgell*, 12 Mod. 166, Lord Holt stated that he did not doubt that the assignee of a rent-charge to which was attached a covenant to pay the rent could bring covenant against the grantor; but the point of the case, as is remembered, was whether the burden of the covenant to pay the rent would run to the assignee of the land charged with the rent. This dictum of Lord Holt was disapproved in *Milnes v. Branch*, 5 M. & Sel. 411, where Lord Ellenborough held that the assignee of a rent could not sue the owner of the land on his covenant to pay rent and to build. And this case was indorsed by Baron Parke in *Randall v. Rigby*, 4 M. & W. 130, 135.

But in *Sharp v. Waterhouse*, 7 E. & B. 816, the running of the benefit of a covenant in the grant of an easement was accepted without dissent. This decision made no impression, however, for in *Hayward v. Benefit Building Society*, 8 Q. B. D. 403, an action by the assignee of a rent on a covenant for repairs by the grantee of the land, it was said that *Milnes v. Branch* had settled the law that the covenant would not run with an incorporeal hereditament.<sup>1</sup> These were all cases on the question of the assignment of the rent carrying the covenant in the original deed, but there appears no ground for distinction between that and the case where the original conveyance was the rise of the rent. Yet in *Werderman v. Société Générale D'Electricité*, 19 Ch. D. 246, the burden

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<sup>1</sup> Compare, however, *Butler v. Archer*, 12 Irish C. L. N. S. 104, stated *supra*.

of a covenant was enforced against the assignee of the grantee of letters-patent; and while it was in equity, and really has nothing to do with land, it may have some influence upon future decisions. Mr. Sugden thought covenants would run with incorporeal hereditaments. V. & P., 14 ed., p. 577.

There is no doubt that covenants in leases of incorporeal hereditaments ran both ways, but it will be remembered that the Statute of 32 H. VIII mentions them as included; and as the statute includes other rights which unquestionably did not run at Common Law, as rights of entry, no deduction can be made from that fact. For English decisions in leases see *Bally v. Wells*, 3 Wilson 25, a lease of tithes; *Portmore v. Bunn*, 1 B. & C. 694, a lease of the right to make a canal; *Martyn v. Williams*, 1 H. & N. 817, a license for years to look for clay; *Earl of Egremont v. Keene*, 2 Jones Irish Eq. 307, a grant for years of the customs of a fair; *Norval v. Pascoe*, 34 L. J. Ch. 82, a license to dig for coal—all collected in 1 Smith's Leading Cases, 9 ed., in notes to Spencer's Case.

As has been indicated, the universal law in America is that covenants will run with the grant of incorporeal hereditaments whether the covenant is made in the creation of the hereditament, as a covenant to pay rent, or whether the covenant is annexed to the hereditament so as to be conveyed by its assignment, as a covenant with an easement. In *Springer v. Phillips*, 71 Pa. 60, the assignment of a rent carried the covenant to pay it. So in *Fisher v. Lewis*, 1 Clark 422, and *Raby v. Reeves*, 112 N. C. 688, where the grant for which the rent was exacted was merely a way; and see *Conrad v. Smith*, 5 Wkly. Not. Cas. 402; *Ritzman v. Spencer*, 5 Pa. Dist. Ct. 224; *Scott v. Lunt*, 7 Peters 596; *Kunkle v. Wynick*, 1 Dall. 305. *Weill v. Baldwin*, 64 Cal. 476, involved the running of covenants with the grant of a ditch. So a covenant can run when made in the grant of

a way. *Ry. v. Reeves*, 64 Ga. 492; *Ruddick v. Ry.*, 116 Mo. 25; *St. L. I. M. & S. Ry. v. O'Baugh*, 49 Ark. 418; *Lydick v. Ry.*, 17 W. Va. 427. But see *Ry. v. Bosworth*, 46 O. St. 81, and *Bishop v. Quintard*, 18 Conn. 395, apparently contra. So a covenant will run with the grant of a water privilege, *Nye v. Hoyle*, 120 N. Y. 195; *Fitch v. Johnson*, 104 Ill. 111; *Fresno Canal Co. v. Dunbar*, 80 Cal. 530; *Norfleet v. Cromwell*, 64 N. C. 1; *Stirling Hydraulic Co. v. Williams*, 66 Ill. 393; but compare *Wheelock v. Thayer*, 16 Pick. 68, seemingly contra. And the covenant to fence ran with the easement granted in the reserved land in *Bronson v. Coffin*, 108 Mass. 175.

In *Bradley v. Walker*, 14 N. Y. Supp. 315, a covenant to refrain from building upon eight feet of parking was held to run although there was no grant; but the case is really a mere extension of the English doctrine of *Tulk v. Moxhay*, 2 Phil. 774.

In *Middlefield v. Knitting Co.*, 160 Mass. 267, the privilege was allowed to mill owners to raise a dam and so to build a higher bridge, and this was enough to enable a covenant of the mill owner to run. This case was handled by Mr. Justice Holmes as the converse of *Pakenham's Case*, being the running of a covenant against land for the benefit of the public personified in a corporation, while *Pakenham's Case*, Y. B. 42 E. III, 3, seemed to indorse the running of a covenant against the successors of a corporation, for the benefit of a particular piece of land. The case would seem anomalous, and to be sustained only on Mr. Justice Holmes' own theory that the execution of a covenant is the grant of an easement. On that ground this covenant in *Middlefield v. Knitting Co.* was the grant of an easement in gross to the town.

But the most important instance of the running of covenants with the grant of easements is the case of party-wall agreements, where there has been no sale of land, but merely

the executed agreement of adjoining property-owners that one may build, the other, his heirs or assigns, covenanting to pay their share of the expense of the party-wall on their subsequent user. Such an agreement was enforced as running with the land in *Hart v. Lyon*, 90 N. Y. 663; *Stewart v. Aldrich*, 8 Hun 241; *Mott v. Oppenheimer*, 135 N. Y. 312; *Conduitt v. Ross*, 102 Ind. 166; *Joy v. Boston Penny Savings Bank*, 115 Mass. 60; *Huling v. Chester*, 19 Mo. App. 607; *Tomblin v. Fish*, 18 Brad. 439; *Roche v. Ullman*, 104 Ill. 11; *Gibson v. Holden*, 115 Ill. 199; *Weyman v. Ringold*, 1 Brad. 40; *Mohr v. Parmalee*, 43 N. Y. Super. Ct. 320; *King v. Wight*, 155 Mass. 444; *Pfeiffer v. Matthews*, 161 Mass. 487; *Horn v. Miller*, 136 Pa. 640; *Hall v. Geyer*, 14 O. C. Ct. 229; *Guentzer v. Juch*, 4 N. Y. Supp. 39; *Pillsbury v. Morris*, 54 Minn. 492. But see *Crater v. McCormick*, 4 Col. 197, and *Sharp v. Cheatham*, 88 Mo. 498, contra.

## SECTION 4.

### OF THE MATTER OF COVENANTS.

It is perhaps well to refer in this chapter to the substance of the covenants, although it is governed by the same rule that plays so important a part in the law of covenants in leases. To run the covenant must be one which touches or concerns the land. This has been differently stated by nearly every judge who laid it down. In *Spencer's Case* that expression itself is used. "They must be for the benefit of the land," *Cockson v. Cock*, Cro. Jac. 125; or as Lord Brougham put it, new and unusual incidents cannot be attached to the land, either as benefits or burdens. *Keppell v. Bailey*, 2 M. & K. 517. So it has sometimes been said that the covenant must be to do something upon the land of the covenantor, *Ruddick v. Ry.*, 116 Mo. 25; though it is believed that this statement is too narrow. In *Woolecroft v. Norton*, 15 Wis.

198, the limits were described so as to indicate that the covenant must be presumably an advantage even to the land it burdens. "Where the covenant is one about or affecting the land devised or granted and tends directly and necessarily to enhance its value or render it more beneficial to those by whom it is owned or occupied, the covenant is said to be incident to the land and binding upon those in whom it subsequently rests."

So it is held that the covenant must be consistent with public policy, must regulate the mode of enjoying the grant, and be such that in its absence the grant will be different from what was intended. *Norfleet v. Cromwell*, 64 No. C. 1. And some seem to think that the covenant must be part of the consideration for buying the land. *Lydick v. B. & O. Ry.*, 17 W. Va. 427.

On the whole, therefore, it would seem that there is no real rule which can govern new instances so as to rule them in or out. From the cases the conveyancer can see what has been the drift of the decisions, and they have been sufficiently abundant for the grantor not to go far astray in judging what the courts would sustain.

## SECTION 5.

### OF THE NECESSARY WORDING OF COVENANTS AND THEIR CONSTRUCTION; AND OF THE NAMING OF THE PARTIES.

We come now to examine the wording of covenants and what will indicate, other things being sufficient, when it is clear that a covenant exists. In England, where all formal instruments are drawn with more care than characterizes drafting with us, it is very rare that the question arises whether a covenant was intended or not. A covenant there is always clearly worded as a covenant, and the only question in doubt is whether the words "heirs and assigns" must

be inserted, whether in particular instances the covenant can run when these mystic words have been omitted. This question was rendered much more important by Coke's discussion of it with reference to leases, referred to under the chapter of this work on that subject; and his notion has been more than once repeated in connection with the general law of covenants running with the land. See *Morland v. Cook*, 6 Eq. 252. As a matter of custom now English grants which contain covenants almost universally mention all successors of the parties as included on both sides; and if the derivation of covenants set forth in the early part of this work is the true one, of course historically the heirs and assigns should be named, if included, as that was in early days the only means of accomplishing their inclusion, the old law implying nothing. On the other hand, Mr. Justice Holmes thinks<sup>1</sup> that the words need not be inserted, as he believes the covenant an easement, and they were not necessary in easements. He thinks their use arose from confusion, and that certain decisions evince such a state of the law, e. g. *Hyde v. Dean of Windsor*, Cro. Eliz. 552, ib. 457, s. c. 5 Co. Rep. 24a. It will be remembered, too, that there is doubt whether the word "assigns" was in the covenant in *Pakenham's Case*.

But whatever may have been the first requirements, there has been a tendency in equity to lessen the strictness of necessary form, as the intention of the parties was more fully regarded, and as the matter of covenants is now in England a matter of equity jurisdiction, it is of little importance there whether the conveyancer omits successors or not. In *Collins v. Plumb*, 16 Vesey 434, Lord Eldon said there was a question whether the assigns, "if named," could sue; and in *Keppell v. Bailey*, 2 M. & K. 517, Lord Brougham seems to have thought that assigns must be named. But those cases were decided while the legal notion of running cove-

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<sup>1</sup> The Common Law, pp. 401 et seq.

nants had not been entirely repudiated by the courts. After *Tulk v. Moxhay*, and after the notion had become entirely one of equity in England, there was no longer any fixed limitation as to the matter. Thus in *Keats v. Lyon*, L. R. 4 Ch. 218, where the covenant had been by A, "his heirs and assigns" with B, "his heirs, executors and administrators," Lord Justice Selwyn, in delivering the opinion of the court, said: "It is true that in such cases the court does not require any particular form of deed or covenant, but, as Lord Cottingham observed, would enforce a contract if proved by a mere agreement; but so far as the question may turn upon the intention of Sharp, the vendor, it is not altogether immaterial to observe, that although in both the conveyances to Langton in November, 1842, Langton is made to covenant for himself, his heirs, and assigns, the covenant in both cases is entered into with Sharp, his heirs, executors, and administrators only."

So in *McLean v. McKay*, 5 P. C. 327, and *Richards v. Revett*, 7 Ch. D. 224, restrictive covenants were enforced in equity without the express mention, it seems, of assigns in the agreement.

It is indeed still maintained that a covenant is a formal instrument, and in all formal instruments no one is bound but him who contracts and is named. Yet it is also true that the covenant is not the express contract of any particular successor in title, but is allowed to bind successors, not by agency, but by a peculiar principle of the Common Law, resting wholly on the will of the party who first makes the covenant. It is not, therefore, a question of formality, but a question of indicated intention, both at law and in equity; and in these times when the law is ready to infer anything lying within the four corners of a writing, there should be no doubt that the law should bind or release according to the true construction of the intent without regard to any fanciful wording which serves only to show the intent at last.

The American courts have been much freer to observe this fact, and there has been no end of decisions here which let covenants run both ways without any mention whatever of any sort of successor. What should be enough to supplant their mention, only the circumstances can prescribe;—"that the covenant shall run with the land," "that the covenant shall last forever," "that the agreement shall be perpetual"—all leave not the slightest doubt of the real intention of the parties.<sup>1</sup>

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<sup>1</sup> See *Cincinnati v. Springer*, 23 Weekly Bulletin 250; *Dunbar v. Jumper*, 2 Yeates 74; *Dailey v. Beck*, 4 Clark 58; *Landell v. Hamilton*, 175 Pa. 327; *Clark v. Martin*, 49 Pa. 289; *Muzzarelli v. Hulshizer*, 163 Pa. 643; *Bald Eagle Valley Ry. v. Nittany Valley Ry.*, 171 Pa. 284; *Green v. Creighton*, 7 R. I. 1; *Crawford v. Witherbee*, 77 Wis. 419; *Weil v. Baldwin*, 64 Cal. 476; *Dorsey v. Ry.*, 58 Ill. 65; *Raby v. Reeves*, 112 N. C. 688; *Richardson v. Tobey*, 121 Mass. 457; *Carson v. Percy*, 57 Miss. 97; *Winfield v. Henning*, 21 N. J. Eq. 188; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Countryman v. Deck*, 13 Abb. N. C. 110; *Louis v. Golner*, 129 N. Y. 227; *Bradley v. Walker*, 14 N. Y. Supp. 315; *Hodge v. Sloan*, 107 N. Y. 244; *Post v. Weil*, 115 N. Y. 361; *Graves v. Deterling*, 120 N. Y. 447; *Mott v. Oppenheimer*, 135 N. Y. 312; *Dey v. Prentice*, 90 Hun. 27; *Wooliscroft v. Norton*, 15 Wis. 198; *Snyder's License*, 2 Pa. Dist. Ct. 785; *Bean v. Stoneman*, 104 Cal. 49; *Ry. v. Reno*, 22 Ill. App. 420; *Hickey v. Ry.*, 36 N. E. Rep. 672 (Ohio); *Ry. v. O'Baugh*, 49 Ark. 418; *Fitch v. Johnson*, 104 Ill. 111; *Hazlett v. Sinclair*, 76 Ind. 488; *Peden v. Ry.*, 78 Iowa 131; *Huling v. Chester*, 19 Mo. App. 607; *Curtiss v. White*, Clark Ch. (New York) 389; *Gibson v. Holden*, 115 Ill. 199; *Denman v. Prince*, 40 Barb. 213; *Watertown v. Cowen*, 4 Paige 510; *Dexter v. Beard*, 7 N. Y. Supp. 11; *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 320; *Fresno Canal Co. v. Dunbar*, 80 Cal. 530; *Shaber v. St. Paul Water Co.*, 30 Minn. 179; *Norfleet v. Cromwell*, 64 N. C. 1; *Herbaugh v. Zentmeyer*, 2 Rawle 159; *Conrad v. Smith*, 5 W. N. C. 402; *Guentzer v. Juch*, 4 N. Y. Supp. 39; *Ritzman v. Spencer*, 5 Pa. Dist. Ct. 224; *Lydick v. Ry.*, 17 W. Va. 427; *Coudert v. Sayre*, 19 Atl. Rep. 190 (N. J.); *Coughlin v. Barker*, 46 Mo. App. 54; *Badger v. Boardman*, 16 Gray 559; *Jewell v. Lee*, 14 Allen 145; *Skinner v. Shepard*, 130 Mass. 180.

*Maynard v. Polhemus*, 74 Cal. 141, if contra, cannot be supported in the light of later decisions in the same court.

In *Clark v. Dewey*, 124 N. Y. 120, the wording seemed to show an especial meaning in the omission, as was the case in *Hart v. Lyon*, 90 N. Y. 663.



In many American cases the question whether a covenant existed has been more difficult than the mere decision on the omission of heirs and assigns. If the intention shall operate to make a covenant without one set of words, then why not without others? Indeed, why should the word "covenants" be necessary? That brings it down to the interpretation of a mere proviso or agreement or stipulation inserted in the deed; and it may be very hard to tell in a particular case whether the intention was to make a covenant or a condition of forfeiture or an easement. Of course the law avoids conditions if possible, for their effective consequence is the entire forfeiture of estates when a smaller penalty would serve justice; but this aversion can be but a small limitation on the difficulty of reading the intention.

In *Graves v. Deterling*, 120 N. Y. 447, the court construed an agreement that a park should not be built upon as a covenant and not a condition, but said that express words could not decide. "It must be determined from the apparent intention to be derived from the locality of the expression in the grant, and all the circumstances." So in a conveyance to a railway stated to be "upon express condition that the said railway, their successors or assigns shall at all times maintain an opening into the premises hereby conveyed," the proviso was held to be a covenant and not a condition. *Avery v. Ry.*, 106 N. Y. 142. So in *Dey v. Prentice*, 90 Hun 27, a stipulation that the grantee should fence was held a covenant. See also *Hammond v. Ry.*, 16 S. C. 569; *Hartung v. Witte*, 59 Wis. 285.

In distinguishing between covenants and easements there is not even so efficient an aid as an established rule to avoid the one or the other when possible; for in far the majority of cases there is no such consequence as in case of conditions. The courts have therefore been very loose in many instances in drawing the distinction, and have even used both words in the same opinion in reference to the same right. There are

some agreements which it would seem impossible to call easements; but there are others, as fencing and perhaps repairs, according to a recent case, which might be either; whereas there are still others, as agreements to leave a way open or stipulations to leave a park, which are so much in line with the ordinary grants of easements that it would seem very strong to make them covenants. Of course the intention must always determine, and that the court each instance must decide; but where the parties have used the word "covenant" and name heirs and assigns, there would seem little doubt that they intended nothing else, and it would be very strong to call it an easement. In *Blount v. Harvey*, 6 Jones (N. C.) 186, the court said that a covenant will not be interpreted to be an easement as it is against the science of the law. But Mr. Justice Gray in *Bronson v. Coffin*, 108 Mass. 175, said, "Words sounding in covenant only may operate by way of grant of an easement, wherever it is necessary to give them that effect in order to carry out the manifest intention of the parties."

*Bronson v. Coffin* was a case of the grant of an easement of fencing, coupled with a covenant to fence, as the court interpreted it, and the opinion would seem an excellent guide to the law. The old English decisions recognizing the easement of fencing, seem never to have indicated that a covenant to fence was an easement, and the Massachusetts court did not decide that it was. It merely implied from the covenant the intention also to grant an easement, in effect admitting a distinction between them. As has several times been pointed out, however, this is not universally accepted without question; some believing them the same thing, treat them in the same way.<sup>1</sup> It is unnecessary here to take up that question again, as it has been so fully discussed in the chapter on the origin of covenants which run with land.

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<sup>1</sup> Holmes, *The Common Law*, pp. 401 et seq., contains the strongest argument for their identity.

## CHAPTER X.

### OF THE CLASSES OF COVENANTS MOST FREQUENTLY OCCUR- RING.

Section 1. Covenants as to the maintenance of fences and walls and mill-dams.

Sec. 2. Covenants as to the building and use of party-walls.

Sec. 3. Covenants as to the leaving open of ways and parks.

Sec. 4. Covenants compelling or restricting building to a particular line

Sec. 5. Covenants restricting the kinds of uses of property in a particular locality.

All that has been hitherto said has been said of covenants in general and is applicable to all covenants which touch or concern the fee estates to which they are attached. The rules applicable to the running of one kind, it is believed, are applicable to the running of every kind without exception. And as the American law of covenants was traced out in the several states, any desire to find the law in a particular state may be satisfied by reviewing the decisions there as given in Chapter VII. If the reports of the locality in question present no decision upon covenants, the investigator may find it well to review the given decisions of all the states to find the general trend of the law. In short, it is believed that if the right to be investigated is legitimate matter for a covenant, and if its formalities conform to the requisites of covenants given in Chapter IX, whether its running will be sustained depends upon the general law in each particular state, and not upon whether the identical covenant has been allowed to run in that state, or has been sustained in other states. In points of law capable of being resolved into general principles, there need be little fear but that courts will follow the

investigation of the principles if logically explained without distinction between accidental facts. It was thought, therefore, that an examination of covenants on each subject separately would rather mislead than aid the investigator, as no one subject of covenants has involved decisions upon all the important principles; and all subjects would have to be examined before coming to a complete and final conclusion upon the law applicable to-day. But it has been suggested that many points have been clearly decided upon each of the covenants commonly met with in the law, and that it would aid a quick investigation of those points to make a brief array of the law on the common covenants separately. This has been done, therefore, at the expense of somewhat enlarging the work, but where any point has been clearly and separately stated elsewhere in the volume time and space have been saved by referring the reader to those statements.

In Chapter I, the common covenants which are attached to fees were arranged in five classes and these classes will now be briefly treated in the order there given. The examination here given is limited, however, to their operation as rights at law, just as all covenants have been treated up to this point in the work. If the covenant be admitted not to run at law, the process of reasoning applied in chancery by which some covenants have been enforced as equitable easements which are rights incapable of being conferred so as to operate at law, is so long as to involve separate examination. And indeed whatever be the effect of the covenant at law, if investigation is made of rights in equity, so different and so much looser are the requirements of chancery in the limited sphere in which equity can give relief, that it is necessary to postpone the examination of all covenants in equity to the next chapter. Moreover, where equitable rights exist the requisite technicalities of form in them are so few that to follow out each class of covenants separately in its operation in equity would be useless repetition.

## SECTION 1.

COVENANTS AS TO THE MAINTENANCE OF FENCES AND WALLS  
AND MILL-DAMS.

Covenants concerning fences and walls are usually covenants both to build and maintain them, and have occurred most commonly in America in connection with grants to railroads of rights of way. The land owners along the line, in granting the right of way for the railroad, usually exact of the railroad company the engagement to keep their track so guarded as to avoid the danger to any land owners of having their cattle, when straying upon the track, killed by the trains. The main question is whether such an engagement to fence is a covenant or a granted easement. As the American habit is, however, to insert the agreement in the deed to the railway company, and as the company rarely signs the deed, as pointed out in Section 3, of Chapter IX, it may well be doubted whether in such a case it can be an easement; for easements must be signed like all grants. In such cases as deeds-poll the agreement is a parole agreement, having the effect of a covenant to the extent that parole agreements are enforceable and the reader is referred to Section 1 of Chapter IX for their discussion. See also *Bronson v. Coffin*, 108 Mass. 175, explaining *Parish v. Whitney*, 3 Gray (Mass.) 516.

But to consider the formal case of the agreement to fence signed by the person to be bound by it. There is some authority to consider such an agreement as a grant of a spurious easement; and if an easement, it runs with the land itself and attaches to it without reference to how the possessor or the beneficiary gets his title to the land. See Chapter III. Mr. Justice Holmes, *The Common Law*, p. 392, believes that the spurious easement to fence has long existed as such, and logically points out that there is no difference between the

duty to fence and the duty to repair a fence when once built. Early authorities endorsing the obligation to fence as one attached to the land are *Y. B. 19 H. VI 33*, and *Star v. Rookesby*, 1 Salk. 335; though by referring to Chapter III it will be seen that Lord Holt doubted whether the writ *de curia claudenda* (the writ enforcing fencing) was Common Law or local custom. But enough can be found to make it possible for a court to decide that there is such a thing as an easement compelling the land owner to fence, and it may be a question of construction in each case as to whether the duty is an easement or a covenant. As was seen in Chapter III there are no words which exclusively make one or the other; so the sense and the four corners of the writing must determine what was done. Let the reader refer to Section 5 of Chapter IX for observations upon the interpretation of covenants. If the obligation be an easement it may be held to give broader rights in equity, though imperfectly drawn at law, for it may be then a pure equitable easement, though no decisions have been found of pure equitable easements of fencing. But if an imperfect covenant, its running in equity would be a question of money charge, as explained in Chapter XI.

As to the necessity of there being a grant of a fee, which the duty to fence is to accompany, as seen in Sec. 3, Chapter IX, in America, covenants may run with easements, while in England, even before the running of the burdens of covenants at law was rejected, it was settled that no covenant could run with a mere easement. In America, moreover, the easement is not always clearly expressed; it may be implied in fact in the writing. In *Bronson v. Coffin*, 108 Mass. 175 (same case, 118 Mass. 156), the owner of land granted the fee in a strip of his land to the railroad for its way and himself covenanted to do the fencing. The court held that the grantor impliedly granted also, out of the remainder of his land, the spurious easement imposing upon himself the

obligation to fence, and that the burden of his covenant ran with this easement. The apparent absurdity of implying this easement with which the burden was to run, when the grantor possessed the land itself out of which the easement was taken, and with which the covenant could run, was due to the necessity to determine the very important question whether all the land was burdened by the covenant, or only the part contiguous to the land on the other side of the fence. The court held that only the part along the fence was burdened, and that the remote land might be sold free of the duty to maintain the fence; and to make a line of limitation the court invented the easement, which of course extended only to the land actually supporting the fence. The conclusion is exceedingly clever, and if the parties intended to burden that part of the land only which was contiguous to the fence, the decision is sound. It may well be doubted, however, whether the parties thought anything about it, and in that case the probability is that all the grantor's land was bound. No other such case has presented itself, but reference may be made to a dictum by Denio C. J. in *Adams v. Van Alstyne*, 25 N. Y. 232, 235, which would seem to sustain in this the ordinary view of easements that, where premises are burdened, every part is burdened alike.

Little else need be said about this class of covenants. They have been enforced in the following cases, which are sufficient to establish the general law. Covenants to fence: *Bronson v. Coffin*, 108 Mass. 175, s. c., 118 Mass. 156; *Countryman v. Deck*, 13 Abb. New Cas. (N. Y.) 110; *Kellogg v. Robinson*, 6 Vt. 276; *Hazlett v. Sinclair*, 76 Ind. 488; *Lake Erie Railway v. Priest*, 31 N. E. Rep. (Ind.) 77; *Toledo Ry. v. Cosand*, 33 N. E. Rep. (Ind.) 251; *Ry. v. Power*, 43 N. E. Rep. (Ind.) 959; *Midland Ry. v. Fiss*, 125 Ind. 19; *Dorsey v. St. L. & c. Ry.*, 58 Ill. 65; *Hartung v. Witte*, 59 Wis. 285; *Ky. Cent. Ry. v. Kenny*, 82 Ky. 154. *Contra.*, *Ry. v. Bosworth*, 46 Oh. St. 81. In Rhode Island a statute

makes these covenants to run, *Thayer v. Smith*, 7 R. I. 164. Covenant to build a wall: *Peden v. Chi. etc. Ry.*, 78 Iowa 131. Covenants to repair dams: *Middlefield v. Knitting Co.*, 160 Mass. 267; *Denman v. Prince*, 40 Barb. 213; *Nye v. Hoyle*, 120 N. Y. 195; *Fitch v. Johnson*, 104 Ill. 111; *Wooliscroft v. Norton*, 15 Wis. 198; *Howard Mfg. Co. v. Water Co.*, 53 Ga. 689; *Wheeler v. Schad*, 7 Nev. 204; *Norfleet v. Cromwell*, 64 N. C. 1.

## SECTION 2.

### COVENANTS AS TO THE BUILDING AND USE OF PARTY-WALLS.

These covenants are particularly important in the rebuilding of old towns where land is of great value; but they have been quite broadly extended to the building of additions to cities, where they are aimed chiefly at the reduction of the cost of erecting buildings. Most commonly the agreement contemplates the erection of a wall upon the division line between two city lots, the wall resting half upon one lot and half upon the other, and serving as the side supporting wall of buildings to be built on each lot. Sometimes the buildings are built at the same time; and then the agreement has to do chiefly with the maintenance of the wall, or its new erection in case of destruction. But oftenest one building is built before the other; and then the agreement declares the status of the wall, and has to do with the respective rights of the adjoining owners when the adjoining vacant lot shall be built upon, and the party-wall thereby employed. In this case the usual agreement is that the lot owner who builds first shall erect the wall upon the line at his sole expense, and the adjoining lot owner on desiring to build, shall pay to the owner of the party-wall one-half of its cost. Of course, however, all sorts of agreements are drawn up, having varied effects in law, but the gist of the transaction is usually the same.



The original status of the lot owners, before the execution of the agreement is commonly one of two kinds. The first is the not uncommon case where land is divided into lots and sold by a company, and all the deeds to the lots contain covenants that the adjoining lot holders may have party-walls, each covenanting to allow his neighbor to build such a wall, and covenanting to pay the neighbor or his assign one-half the cost of the wall when he himself shall use it. The second is where the adjoining land owners received deeds to their lots without these covenants, but for their own economy execute such an agreement.

It is apparent that the first case occasions no difficulty, as it is in accord with the usual requirements for the running of covenants. So if the covenants are properly executed and signed by the grantee as well as by the grantor; and the intent is clear that either owner or his assign may build, and the adjoining owner or his assign may use and pay, the law will enforce the agreement and the second builder will be bound to pay for his half of the wall when he uses it, either to the first builder or to the first builder's assign of the built property, according to the intent and wording of the covenant. There was an original passing of land from the Land Company to the first buyer and the lot sold and all the lots retained were bound and benefited respectively for each other. Therefore the subsequent buyer of the lot adjacent to the former took his lot already burdened and benefited; and the covenants run without difficulty.

But the second case is not so easily explained. If the adjoining owners already own their lots when they execute the party-wall agreement, there is no passing of land between them, and the question is how are the historical requirements of covenants complied with, so as to enable the covenants to run with the two adjoining pieces of land. If any grant was made it would seem to be an easement of the use of the ground covered by the half of the wall which will rest upon

the land last built upon, the other owner building at once and enjoying the easement to hold up the wall which he as yet owns in entirety.

What, however, is the legal status? If the grant of an easement can be clearly found, it has been pointed out that in American law at least such a grant is sufficient. See Chapter IX, Section 3. But while it is the general view that this easement exists, it involves some difficulties. The present conception of party-walls, when put up jointly, seems to be that each party owns to the center of the wall with cross-easements of support. This easement is of course actually or impliedly granted at the time of making the wall. If, however, the builder owns the whole wall, then his easement must not be one of support for his half by the other half, but an easement of the use of the surface of the ground, which easement would have to be terminated and the easement of support be granted at the time when the wall should be used. But as no new easement is in fact granted, then it must have been granted at the time of the agreement to operate in futuro upon the payment by the other party of half of the cost of the wall. Such an easement would then arise, for the moment the easement of occupation ceased, the builder's property in the wall beyond his lot would pass as a fixture to the other lot owner. But such a state of affairs is comically complicated, to say nothing of the extreme rarity of an easement to operate in futuro, though it may be indeed possible. (Gray, *Rule against Perpetuities*, § 16; Lewis on *Perpetuities*, 600. )

On the whole the simplest theory, and the one as near the intention of the parties as any, is that the wall on being built is like any other party-wall, and being a fixture, belongs to the owner of the land which it covers; but the owner who did not join in the construction is not to pay for his share until he uses it, and covenants to that end. On this theory the only easement implied at once, but which is sufficient to

start the covenants to running, is the right granted by the one land owner to the other who builds to enter the land of the former for the purpose of building the wall.

This difficulty settled, the next is to solve the rights of the parties as to the collection of the money from the later builder, who is not to pay for his share until he uses the wall. And this trouble may exist where there was an original grant of land to start the covenants as well as when there was none. It is the question of the intention between the parties as to who should own the wall until both parties should pay. The general interpretation is, that the first builder owns the whole wall, exercising the easement as above indicated upon the adjoining land; and if he sells his property before the adjoining lot owner builds that he conveys to his vendee title to the whole wall and the right to collect the cost of half the wall from the other when he builds. Thus the burden covenant is interpreted to mean a covenant to pay half the cost of the wall to him who owns the building at the time of user of the wall.

But the writing will not always sustain this view. In *Gibson v. Holden*, 115 Ill. 199, the agreement was between Holden and one Armstrong, adjoining lot owners, that Holden "might build a party-wall, all the cost to be paid by Holden, and that Armstrong should pay half the cost when he should use the wall." The court indorsed the general view, but held that the effect of the agreement here was Holden's lending Armstrong the money for Armstrong's half of the wall, to be paid back when Armstrong should use it; so the right to recover the cost did not run to Holden's assignee. The conclusion of the court may have been sound as to the intention expressed, for sometimes the parties will make clear very peculiar intentions; but the ordinary duty of the court is to construe agreements when the parties merely intended the general effect of the party-wall agreement without ever having carefully worked out the means to that end. As sim-

ple a theory as any, is the one which gives the least difficulty about the existence of the easements to be worked out; and as it works out as well for the collection of the money as in establishing the legal status, it recommends itself for all cases where a clear opinion to the contrary is not expressed. The wall, on being built, like all party-walls, belongs to the owners of the land covered, but the owner who did not join in the construction is not to pay for his share until he uses it, and covenants to that end. Then the builder, who sells his land with all claims and appurtenances, transfers to his assignee the right to the payment for the half share in the wall when the duty to pay shall arise.

It is probably upon this theory that some of the cases hold that the right to remuneration for half the cost is personal, not passing as an appurtenance to the grantee of the builder. *Todd v. Stokes*, 10 Pa. 155; *Pillsbury v. Morris*, 54 Minn. 492.

In the following cases party-wall covenants were enforced which originated in a grant between the creating parties. *Savage v. Mason*, 3 Cush. 500; *Standish v. Lawrence*, 111 Mass. 111; *Richardson v. Tobey*, 121 Mass. 457.

The greater number of cases, however, have been upon running of agreements executed without the passing of land. Such were held enforceable in *Hart v. Lyon*, 90 N. Y. 663; *Stewart v. Aldrich*, 8 Hun 241; *Mott v. Oppenheimer*, 135 N. Y. 312; *Conduitt v. Ross*, 102 Ind. 166; *Joy v. Boston Penny Savings Bank*, 115 Mass. 60; *Huling v. Chester*, 19 Mo. App. 607; *Tomblin v. Fish*, 18 Brad. 439; *Roche v. Ullman*, 104 Ill. 11; *Gibson v. Holden*, 115 Ill. 199; *Weyman v. Ringold*, 1 Brad. 40; *Mohr v. Parmalee*, 43 New York Super. Ct. 320; *King v. Wright*, 155 Mass. 444; *Pfeiffer v. Matthews*, 161 Mass. 487; *Horn v. Miller*, 136 Pa. 640; *Hall v. Geyer*, 14 O. C. Ct. 229; *Guentzer v. Juch*, 4 N. Y. Supp. 39; *Pillsbury v. Morris*, 54 Minn. 492. But see *Crater v. McCormick*, 4 Colo. 197, *contra*, and *Sharp v. Cheatham*,

88 Mo. 498, which probably overrules the decision of the lower court sustaining such covenants in *Huling v. Chester*, given above. *Bloch v. Isham*, 28 Ind. 37, decided against such a covenant, but the law of it was overruled in *Conduitt v. Ross*, 102 Ind. 166, given above. So, too, *Cole v. Hughes*, 54 N. Y. 444, and *Scott v. McMillan*, 76 N. Y. 141, deciding against the running of such an agreement not originating in a grant, are probably no longer law in New York, as will be seen from the later decisions given above.

The Missouri decision against running in *Sharp v. Cheat-ham*, 88 Mo. 498, indicated, however, that such a covenant would run in equity, and that brings up the interesting question how far such covenants as party-wall agreements can run in equity when not allowed at law, or whether they can be enforced at all in equity, not being restrictive covenants.

As already indicated, matters involving pure equity jurisdiction must be left to be considered systematically in the next chapter. It may be well to point out here, however, that equity would probably treat the running of the burden of the agreement in such jurisdictions as do not allow the running of the covenant, as a money charge of half the value of the wall, binding upon the land in equity as any other equitable money charge. But of this more in the next chapter.

In the preceding Chapter IX, Section 1, the running of a parole agreement about party-walls was discussed in connection with *Maine v. Cumston*, 98 Mass. 317, which seemed to support at law an unsealed agreement. Reference may well be made to that section.

In equity on every theory which does not recognize the running of the covenant as such, intention plays a most important part, and form is largely dispensed with. But while this brings undoubted advantages when the agreement is thus effective, it greatly embarrasses in many cases on ac-

count of the limits of scope of circumstances in which it is effective.

Unfortunately, it is necessary to note that every party-wall agreement, conferring future rights to use the wall, upon future indefinite holders of the land adjoining that of the builder, and conferring rights to exact half the cost of the wall in case of such use, upon future indefinite successors of the builder, is an offense of the rule against perpetuities. However the effect of the agreement is taken, the rule seems to be offended. If, as was preferred above, the property in the half of the wall resting on the edge of the vacant lot passes to owner of the vacant lot at once, and he contracts that at the time that he or any remote successor shall use the wall, the user shall pay to the successor of the builder half the value of the wall, a right to a sum is given to a person who may not be determined within a life in being and twenty-one years. On the other hand, if the effect of the agreement is to let the builder own the wall, and to confer upon any future owner of the adjoining lot the right to buy half of the wall resting on his land, then clearly it confers a right to property upon a person, not necessarily determined within the life in being and twenty-one years. The right to buy land thus conferred was held void in *L. & S.-W. Ry. v. Gomm*, 20 Ch. D. 562 (see Chapter VIII) ; and there appears no way to escape the rule here. As yet, however, the point has never been raised in a party-wall case, and such party-wall agreements have been universally held good.

In the appendix have been inserted forms for party-wall agreements.

### SECTION 3.

#### COVENANTS AS TO THE LEAVING OPEN OF WAYS AND PARKS.

Whatever may be said of other rights capable of being conferred by covenants, these rights are undoubtedly capable

as well of being easements. They are rights over the property of others, in the one case for passage merely, in the other for all sorts of occupancy not of a permanent nature, and for light and air. The commonest instance of the use of covenants for ways is in the severance of property where the grantor increases the usefulness of one piece retained or granted by the agreement for a way over the other. While the commonest cases of covenants to leave open large pieces of land for parks are where land companies divide up plots of ground into lots, the value of which is supposed to be enhanced by contiguity to an open area. Of course ways are often instituted by land companies in the same way; but when ways are provided for by companies they are oftenest made permanent by dedication, a means probably not so frequently used as a permanent guaranty of areas for light or air, or small plots of parking. It is hardly necessary to draw distinctions between covenants and the process called dedication, especially as dedication is so frequently regulated by statute. Suffice it to say, that by dedication a permanent use is usually instituted in the whole public, which cannot be destroyed by mere agreement of the creating parties; whereas it is evident that covenants and most easements are for particular parties, and may be extinguished by their consent.

The distinction between covenants and easements has been drawn at length in the first chapter; but it must be reiterated that in such cases as these ways or parks especially, it is important to decide whether the right conferred is an easement or a covenant. This is not important in determining whether those in privity of estate may enjoy it, but in determining sometimes whether any right at all is created. While it was proven in the third chapter from the cases, even of older times when conveyances were more nearly exact, that there were no express words to convey easements or covenants peculiarly; and that "grant" was often used to

make a covenant, and "covenant" to convey an easement; at the same time it might well be feared that if the one was clearly intended and expressed, in case of fatal deficiencies, the other might not be allowed. True enough the doctrine is as old as conveyancing, that if a conveyance is bad by one theory it will be sustained if possible on another. See Chapter III. But while that may obtain where merely the general effect of a conveyance was intended, yet where the question is whether one right was intended or another, the courts might hold that the failure to grant one could not be construed into another. The rights of different parties might depend upon it. And while a bad easement might be held a good covenant without injustice, as a covenant being only for privies in estate would extend to fewer parties than an easement, yet certainly it would be unjust to hold a bad covenant a good easement, as an easement would not be limited in its operations to privies but would extend to all holders of the land. But the whole ground is dangerous. We have seen how the court in *Roach v. Wadham*, 6 East 289 (stated in Chapter VII), held that certain acts of a grantor constituted an appointment and not a grant, so that a covenant could not possibly run to the appointee, when it might have been held to run to the grantee; and while that is not exactly in point, yet the decision resulted in relieving an assign of a covenant obligation where assigns were named as intended to be bound. Moreover, the construction may not be always the direct cause of the subjection or non-subjection to liability. If the right conferred is an easement, then its rights may be abated by inconsistent user regulated by one clause of the Statute of Limitations; if it be a covenant, then the effect of its breach will be regulated usually by another clause of the Statute of Limitations. Again the method of execution may have an important effect. If an easement, unless a right of way of necessity (on the requirements of which some work on easements may be examined), it must be signed by



the person granting. If a covenant, the additional requirement is found (see Chapter IX, Sec. 2) that a grant must pass between the parties.

It is therefore apparent that the conveyancer and the interpreter must be careful as to whether an easement or a covenant was conferred. When it is once clear what right has been conferred there is nothing to be learned about the running in law courts of covenants for ways or parks which is not true of all running covenants. For the requisites reference may be had to the various sections of Chapter IX. And as they are in form restrictive covenants, and in essence capable of being equitable easements, they will probably be recognized as running at least in equity in all Common Law jurisdictions. Their characteristics as rights in equity are postponed until the next chapter, and as the reader will surmise, they give less trouble in equity than any other covenants. When formal requisites are eliminated, and the class affected by the obligation limited to those who have notice of it, as must be the case if the right be imperfectly conferred, it makes little difference whether the right is called a covenant or an easement.

Attention will be called to the frequent recognition of the running of these covenants as covenants in America, and the reader may then pass to the class of covenants to be discussed in the next section.

Covenants or stipulations for ways were recognized as running in *Dailey v. Beck*, 4 Clark (Pa.) 58; *Avery v. N. Y. Cent. Ry. Co.*, 106 N. Y. 142; *Baltimore v. White*, 62 Md. 362; *Brew v. Vandeman*, 6 Heiskell 433; *Gibson v. Porter*, 15 S. W. Rep. 871 (Ky.). Covenants to leave ground open were recognized in *Hills v. Miller*, 3 Paige 254, and *Watertown v. Cohen*, 4 Paige 510.

## SECTION 4.

## COVENANTS COMPELLING OR RESTRICTING BUILDING TO A PARTICULAR LINE.

It is very common in laying out additions to the residence portion of cities where the houses are expected to extend the full width of the lots, to require by covenants that the fronts of houses shall not extend beyond a fixed line; and there seems no reason why covenants should not be used in smaller communities where ground is not so valuable to compel the owners to build up to a particular line. The purpose for the covenants is the same, namely to obtain a symmetry in the properties which adds to the beauty, and therefore to the value of the locality. But while covenants restraining the building are of most frequent occurrence, no case has presented itself of a covenant compelling building to a line. As the operation in courts of law would be the same, both forms have been included in the subject of the section, though a case involving covenants compelling building up to a line does not seem to have been presented for litigation. In courts of equity, however, the operation of the two covenants would be different; for a covenant compelling building to a line is not a covenant to be passive, while a covenant restricting to a line is a covenant to be passive. If an owner should attempt to build back of a line up to which it was stipulated that he should build, a court of equity might have some difficulty in finding how to make him change it. If the house were once completed, the court would hardly be justified in making him tear it down, and of course it has no power to make him add to it in front; while if it were possible to tell beforehand that the owner was not going to build to the line, the most the court could do would be to enjoin him from building at all, which it would hardly be justified in doing.

If, on the other hand, the owner should attempt to violate a covenant restricting his line, and should begin to build beyond it, it is apparent that the court would have no difficulty whatever in enjoining him from building to the extent that he should be advancing beyond the line. The reason of this will appear clearly in the next chapter when the rights and powers of equity will be discussed in connection with all covenants. It is referred to here, only to show that a covenant compelling building to a line is a covenant the breach of which can be taken cognizance of only in a court of law, where the rights of the injured sound in damages; while the covenant restricting to a line can be regarded in law where its breach gives right to damages, or may be enforced in form in chancery as well as by injunction.

As the former covenant apparently has not been litigated, no more need be said about it; but the latter is very common, so it had best be examined further. The right to restrict building to a line is one of the most common of the restrictive covenants, and in England constitutes, along with the covenants in the next section, the greater part of the subject matter of so-called equitable easements. As shown in Chapter VII the burdens of covenants do not run at law in England at all, nor in the states of New Jersey and Virginia. They are enforced under certain conditions in equity where the successors have notice of them; and the theory under which they have been enforced will appear in the next chapter to be that they confer rights similar to easements. This is thoroughly apparent from the doctrine repeatedly referred to in this book that all covenants which run with land are in the nature of easements. The theory applied to restrictive covenants is that the right to compel a man to leave his land open to a line is an easement. And while this may be true in cases where by the covenant the use of the property in the front of each house is given to the city for parking, and the easement is thus in the public; it would seem to be untrue

where the purpose of the covenant is to give the adjoining owners a right to restrain each other to a line. Certainly in this case it is not one of the historical subjects of easement. It is not for passage, occupation, outlook, or air. It is merely for an appearance of symmetry. So, too, it must be enforced in limine, or it is useless; while all other easements are enforced only to a reasonable degree.

The difficulty of regarding the right as an easement will appear more distinctly in equity where formal matters are largely disregarded and the gist of the right conferred by the covenant is before the court for determination; and as it has never been maintained that the covenant granted an easement binding at law, it may be doubted whether this easement is anything but an equity creation. Its development is an accomplishment of the English courts, to take the place with them of the legal running covenant. By calling restrictive covenants equitable easements, they secured their running, though the ordinary covenant they thought could not run. As a covenant, this particular right has not been commonly passed upon by courts of law. Since reparation for its breach is so complete by injunction at the very outset of the building, there has been little or no occasion to plaintiffs to await damage enough to warrant an action at law.

The examinations of cases in equity are postponed for the next chapter, where the covenant attracts considerable attention. But in *Green v. Creighton*, 7 R. I. 1, and *Howard Mfg. Co. v. Water Lot Co.*, 53 Ga. 689, the recognition of the burden of the covenant as a burden at law seems to have obtained. There is no reason to believe, however, that the covenant would not be as thoroughly recognized at law as any other, where the formal requisites of all covenants have been observed as set forth in Chapter IX. But the decisions may sometimes give trouble to the investigator.

Since the American courts have not very carefully examined the doctrine of equitable easements, they have sometimes

taken the stand of allowing covenants to run as legal covenants and at the same time have impliedly denied their running by recognizing the notion of so-called equitable easements. Moreover, this causes in equity the extraordinary condition of having two ideas of the identical right, an unusual lack of economy in Common Law jurisprudence. By recognizing the restrictive covenant as good at law, they recognize it as good in equity, so that for its enforcement on the legal theory notice would not be necessary in equity; while for its enforcement as an equitable easement, as we shall see, notice would be necessary.

The running of benefits has not been separately noticed because it was pointed out in Chapter VII that the running of benefits of all covenants properly created is probably recognized everywhere at law as well as in equity.

## SECTION 5.

### COVENANTS RESPECTING THE KINDS OF USES OF PROPERTY IN A PARTICULAR LOCALITY.

These covenants, like those discussed in the preceding section which restrict building to a line, are in nature restrictive covenants, and most easily enforced by injunction in equity. They are all included under the English equitable easement. But while one can see how a court, seeking to sustain a restrictive building line covenant, might be led to call the right to enforce the restriction an easement, it is difficult to find any pretense upon which to call the rights treated in this section easements. This class of covenants embraces covenants that property shall not be used for business purposes, covenants that some special business undesirable, though not necessarily a nuisance to neighbors, shall not be pursued on the property, and covenants that the same business for which one piece of property is sold shall not be

allowed upon remaining property of the grantor. So, too, we hear of covenants that no houses of less than a particular value shall be built upon the property in question.

It is useless to reiterate the ordinarily accepted subjects of easements. That was done to some extent in the preceding section, and more fully treated in Chapter I and Chapter III. Suffice it to say that no distinctly recognized legal easement, executed as such, has been found conferring the rights intended to be conferred by this class of covenants.<sup>1</sup> And while they are called in England equitable easements, as is explained in the next chapter, the English courts admit that they cannot be perfected as legal covenants, but are fanciful creations of chancery. It may be well to note in passing that they need cause no thought as to whether they are subjects of dedication. Dedication is probably limited to public or quasi public uses (Cf. 2 Blackstone Com. Cooley's ed., page 35, note), while these covenants give rights to individuals or some collection of individuals more or less small.

But whether regarding these rights as running covenants, as may be done in America generally, where the burdens of covenants run, or as merely equitable obligations, as is done even where the running of covenants is repudiated, their usefulness cannot be overestimated. They constitute the only means by which permanent uses of property can be secured, and so are almost essential as a basis for the safe investment of large amounts of money in building in new localities. They secure the character of residence districts, not only by express stipulation as to the cost of houses, but more effectually by agreements that no offensive industries shall be allowed in proximity. And while it is more difficult by agreement to regulate the locus of business, they may be very useful

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<sup>1</sup> In *McMahon v. Williams*, 79 Ala. 288, the agreement not to carry on a general warehouse business was called an easement. But the court relied upon English cases of equitable easements, it would seem, and do not discuss clearly the subject matter of easements.

in introducing business, to prevent profits from being destroyed by too many business establishments of the same kind.

It will be readily appreciated that some covenants of the kind are very useful to land companies in the opening up of their property; and the decisions both in England and America show the great frequency of their employment. But it is no less apparent that they may be of great service to individual landowners in selling off part of their small properties without injury to themselves at the same time that they can be used as inducements to the vendee to purchase.

At first blush there would seem great danger of their indiscriminate and injudicious employment. But as the common means of enforcing them is in equity, on account of the usual desire to stop their infringement in the first stage, it will be realized that all equities may be considered in the granting of an injunction. Moreover, if action be allowed at law, damage is always to be governed by the real injury. But of this more fully in the next chapter.

In England the use of these covenants has been very common; but as they are not now recognized there out of chancery, and as they constitute so large a proportion of the restrictive covenants which are the only covenants recognized in England at all, the discussion of the English cases together with the discussion of the whole subject in equity, both in England and America, is postponed for the next chapter.

As to their formalities, in equity, like all covenants, the requirements are not so explicitly followed as at law. Sometimes, indeed, the agreement may be verbal; or may depend upon some chart or plan shown to the parties to be bound at the time they make their purchase. The cases are taken up in the next chapter. But in law, there is no reason to believe that the formal requisites are in any way different from those laid down for covenants in general. So they may be

followed out by referring at once to the various sections of Chapter IX.

The occasion for considering these covenants in courts of law has presented itself more frequently, for some reason, than was the case with the restrictive covenants discussed in the preceding section. In America, where most of the states recognize the running of the burden of covenants, as was seen in Chapter VII, these covenants were enforced as running legal obligations, and so probably binding at law, in *Muzzarelli v. Hulshizer*, 163 Pa. 643; *Landell v. Hamilton*, 175 Pa. 327; *Snyder's License*, 2 Pa. Dist. Ct. 785; *Norcross v. James*, 140 Mass. 188; *Post v. Weil*, 115 N. Y. 361; *Clement v. Burtis*, 121 N. Y. 708; *Halle v. Newbold*, 69 Md. 265; *Hatcher v. Andrews*, 5 Bush 561; *Robbins v. Webb*, 68 Ala. 393; *McMahon v. Williams*, 79 Ala. 288; and *Hottell v. Farmers' Protective Assn.*, 53 Pac. Rep. 327 (Colo.). But in *Brewer v. Marshall*, 18 N. J. Eq. 337, same case, 19 N. J. Eq. 537, and in other cases in New Jersey it is held that even restrictive covenants do not bind in law courts. The same was decided in *Tardy v. Creasy*, 81 Va. 553. And it is probably law in Ohio and Missouri that these covenants do not bind at law. See Chapter VII.



## CHAPTER XI.

### ENFORCEMENT OF COVENANTS IN EQUITY AND EQUITABLE EASEMENTS.

The scope of rights in equity for parties to agreements running with land is necessarily narrower than would be the scope where the covenants are recognized at law. This is owing to the limits upon equity jurisdiction; for it has always been the theory that a court of equity could not compel a delinquent to do anything which the court could not manage for him in case of his ultimate refusal. Thus a contract for active services cannot be enforced because the court has no way to compel the delinquent to serve. The so-called mandatory injunction has been recognized in certain cases, but the English courts have refused, as we shall see, to grant such a remedy for the enforcing of covenants running with land. At the outset, then, it is evident that any covenant to do something, whether recognized as running at law or not, cannot generally be enforced in equity, for the court's lack of a means; so that when those covenants are imperfectly made, if an assignee is unwilling to carry out the agreement, the party who would complain is probably without a satisfactory remedy of any sort. But if the problem of enforcing covenants in equity is embarrassing in jurisdictions which recognize the running of covenants at law, there would seem to be even greater difficulties where the notion has not been accepted that the covenant would be a good running obligation at law. In such jurisdictions the problem for the court of equity is not only how to enforce the agreement which the parties contemplated, but what sort of agreements equity could enforce, even if it has the means to enforce any at all.

When the English courts decided that a covenant could not run with the land as a Common Law right, they at once limited their theory of rights in equity to such rights as could be enforced by injunction. They recognized what they construed to be restrictive covenants, and confined their recognition to them because these were the only sort of covenants which the courts thought they could enforce in specie. But although the English courts practically agreed to enforce any sort of covenant that could be enforced specifically by an injunction, they have never decided exactly what the nature of the right is that they have been enforcing. It is impossible to call it a covenant running with the land, for enforcing a restrictive covenant by injunction is simply granting specific performance of the covenant; and as it has been assumed by those courts that the covenant is not legally binding upon assigns, to grant specific performance of it in equity as a covenant is a contradiction. The right has therefore been referred to with a great deal of uncertainty, sometimes being called a sort of equitable easement, and sometimes being classed as a sort of trust or a mere equitable charge. It would seem, however, that it cannot find shelter within any of these recognized classes of rights. It is not an easement, because it is not a right against the land; and it is not a right against the land, because it is assumed that it cannot be made an executed right against the land binding at law, for it cannot be granted out of the land. The English courts always say that it binds only holders of the land with notice; that is to say, like all rights in equity, it is a right in personam, not a right in rem.

Moreover, it may be noted that many of the rights conferred by these restrictive covenants have never been thought capable of being subjects of easements; for instance a covenant not to put a particular sort of building on a certain lot. And while some restrictive covenants have conferred rights very similar to easements, such may well be taken in equity

as easements at once; as covenants to leave ways or plots of ground open for passing or for recreation purposes.

Nor may the right be well classed as a trust. If it were a trust, by assumption it would be something separate and distinct, capable of being held. In order to a trust, there must be a *res*, something held in trust, which one party holds as conceivable property, for the benefit in equity of someone else. But in the case of a covenant in equity, there is no *res*, for the land is not held to the benefit of the covenantee, and the restriction or servitude is not property in the hands of the owner of the land subject to it. The utmost that can be conceived is the abstraction of the easement or negative right as a privilege, but as the legal ownership of it must be recognized in some one, and as the covenantee, by hypothesis, is not the owner in law, then the legal owner must be the owner of the land out of which it comes. But the owner of the land cannot be conceived as owning a separate servitude in his own land; so the servitude cannot be said to exist as a thing.

The nearest thing in law to the recognition of such separation of title is probably the separation of title in land held as in common. A can own land in entirety, but hold an undivided half as his own, and an undivided half in trust for B. But it is evident that such a case is different from the incorporeal charge, because the Common Law recognizes in tenure in common two or more separate corporeal objects of property as actually existent, though concrete; whereas easements or servitudes, though conceived as separable, are not recognized by the Common Law until actually separated in title, for they are never corporeally separable from the land out of which they arise. More concisely, the owner of land in law may always be conceived as the owner of two halves of the land, but the owner of the land may never be conceived as the owner of the land and the owner of a servitude against the land at the same time. Such is a peculiarity

of Common Law that while the lawyers conceived a servitude as property for certain purposes, they did not conceive it as property for all purposes; they would not go full length. This matter is made clearer in the third chapter of this essay.

But, though the covenant be not a trust, it is not yet proven not to be a sort of equitable charge, as a rent charge or an equitable easement properly speaking. If there is such a thing as an equitable charge which cannot be made a legal charge, then such a conception of covenants is possible. Equitable rent-charges and equitable easements in general are merely due to a recognition of rights which were never completed at law; and while not in any sense trusts, as has just been seen, they are enforceable in equity because grantable at law, and because as a last resort a court of equity can imprison the delinquent until he consents to complete the legal title by a conveyance good in law. Undoubtedly this is the theory upon which principles of equity are based for the specific enforcement of all trusts and contracts. Equity will complete any rights which were left imperfect at law, and it is believed that this is the limit of equity's remedial jurisdiction. An apparent exception is the method of enforcing express trusts; for in case of the trustee's failure to carry out the trust, equity will appoint a new trustee. But while the various rights against the trustee are not merely rights incomplete at law, they are rights which could be perfected at law, by ultimately compelling the trustee to convey the trust to another, or to reconvey it to the grantor or his heirs.

The strength of an argument in support of enforcing covenants in equity where they are not recognized at law, comes down, therefore, to this: Although the courts assume that there is no sufficient ground in the history of the Common Law to recognize covenants running with the land, they think that the usefulness of such covenants and the equity in them commends them as desirable. So, although a court

of equity cannot perfect the legal rights by compelling the parties to execute a covenant which will run, yet such covenants as amount to contracts not to do something on the land—restrictive covenants—will be specifically enforced where it can be accomplished by injunction, and where the parties were on such notice that they could have conducted themselves in accordance with what was expected of them without suffering injustice. It now remains to be seen how far the courts have followed this line of suggestion and to what extent they have reached this conclusion.

Where it has been broadly stated, as in *Lydick v. B. & O. Ry.*, 17 W. Va. 427, that whenever a covenant is such as could run, it will be enforced in equity though it will not run at law, it must be taken that in that jurisdiction covenants will run at law, and that the court treats that covenant as an equitable charge, perfectable by compelling the parties to execute a complete covenant.

The notion of the right in equity commonly called an equitable easement, while perhaps new in its application, was not intended to present anything more than the principles of equity which had been recognized ever since that branch of the law had been developed. The doctrine was developed in England in connection with a repudiation of the doctrine that covenants run with the land at law, and as it became at once useful in taking the place of that older doctrine as a remedy for the breach of such agreements, it became at once customary to regard it as a substitute for any running of covenants at law. Thus several statements were made about it in later opinions which can hardly be said to be true, although, of course, they have some truth in them. Witness Sir George Jessel's view of a covenant in equity as either an extension in equity of the doctrine of *Spencer's Case* or an extension in equity of the doctrine of negative easements.<sup>1</sup>

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<sup>1</sup> *L. & S. W. Ry. v. Gomm*, 20 Ch. D. 562.

Yet the idea was not confined to the mere running of covenants proper, for the court regarded these equitable obligations binding when oral as well as when written, and considered them rather an equitable claim upon the land. So indeed it may be questioned whether the principle has anything to do with the running of agreements at all. It is true that at first it seems to have been enforced as the running in equity of covenants. In *Whatman v. Gibson*, 9 Sim. 196, Sir John Leach enforced a covenant not to build an inn where the assign had notice, though doubting whether it would run at law, and again a similar agreement was treated as a covenant in *Mann v. Stevens*, 15 Sim. 377; but the notion of distinct equity rights seemed to control the court in the *Duke of Bedford v. The Trustees of the British Museum*, 2 M. & K. 552, and Lord Brougham repudiated the doctrine of covenants running under any circumstances in *Keppell v. Bailey*, 2 M. & K. 517.

But the real declaration of the application of general principles of equity to cases of covenants came in *Tulk v. Moxhay*, 2 Phil. 774; and this is always referred to as the foundation of the doctrine of equitable easements. It was a petition for an injunction to restrain the defendants from building on an open square. The plaintiff had sold this square to the defendant's assignor, who had covenanted to allow it to remain open and to allow the plaintiff's tenants the freedom of it. The defendant took title with notice of the covenant. The court, Lord Chancellor Cottenham, allowed the injunction. In the course of the opinion he is reported to have said: "It is said that the covenant, being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice, of which he purchased." \* \* \* "That the question does not depend upon whether

the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

It is very clear that Lord Cottenham thought the plaintiff had a claim upon the land; but as the Common Law effect of covenants is discarded, some other sort of claim must be meant. Of course, if the intention of the parties had been to throw some sort of recognizable claim upon the land, the purchaser with notice of this intention would be bound by it. But is there an instance where equity recognizes a claim upon land which could not have been perfected at law? Here, however, it has been assumed that there could be no legal obligation upon the land, that the covenantor could not have bound his land by this means. His undertaking carried out to its fullest extent, bound merely himself; and if he did not also contract not to alien the land, how could his successor, though purchasing with full knowledge, have his conscience bound? To say otherwise would be to assume that the covenantor could have bound the land, and had failed to do so,—exactly the contradictory of what was assumed.

But it is said that the covenantor could have bound the land by an easement granted, and so any attempt at that would create a charge upon the land. Now a court of equity might very well say that if an ultimate end was intended, and that possible, though the means attempted be inadequate, that shall not bar the effect of the end, and so the easement shall be a charge upon the conscience of a successor. Indeed, it is an old doctrine in some instances at law that a conveyance attempted imperfectly one way may be good by another which was unwittingly fulfilled. See *Callard v. Callard*, Moore 687, pl. 950, s. c. *Popham* 47. But this view throws the right distinctly into the domain of easements, and it be-

comes necessary to limit its effect to such covenants as could be subjects of an easement. While this was hardly the view Lord Cottenham had in mind, it is very evident that the right in *Tulk v. Moxhay* could have been the subject of an easement, the right to keep a park unbuilt upon—for the purpose of passing to and fro perhaps, or to enjoy light and air.

But though that case may be so explained, the trouble begins when we reach the next case of *Coles v. Sims*, Kay 56, appealed, 5 DeG. M. & G. 1, and *Child v. Douglas*, Kay 560, 5 DeG. M. & G. 739, where the covenant was that buildings should not extend beyond a line. What here is the subject of the easement? The right to keep buildings up to a line? It would seem that it must be an easement of light and air. But neither the light nor the air would be materially interfered with by an encroachment of several inches, indeed, several feet beyond the agreed line; and equity will not restrain by injunction unless the damage is clear to the plaintiff. Yet one foot, two feet, three feet would very materially destroy the symmetry of the block, so that the covenant would be entirely ineffective unless enforced in limine; and the courts have required that the exact line be recognized.

Again come the covenants for some peculiar restriction of the use of land, as in *Mitchell v. Steward*, 1 Eq. 541, where the covenant was not to erect a tavern on the land. The same covenant was enforced by injunction in *Jay v. Richardson*, 31 L. J. Ch. 398; *Carter v. Williams*, 9 Eq. 678; *Sayers v. Collyer*, 24 Ch. D. 180. So a covenant not to use the land for business. *Tyndall v. Castle*, 1893, W. N. 40; *Everett v. Remington*, [1892], 3 Ch. 148. These can hardly be called subjects of easements; and even though that view might be possible, that it is not the one taken was evident from *Wilson v. Hart*, L. R. 1 Ch. Ap. 463. The covenant was not to erect a beer shop. Assigns were not mentioned in the covenant, and the defendant was a lessee without express notice. The court held that the covenant could not run to bind the land



as it was not so intended, but only the use by the person was covered; yet the defendant took under such circumstances that he should have inquired into the limitations, and so was bound by the doctrine of *Tulk v. Moxhay* not to erect a beer house.

It is settled, therefore, that the right extends to enforcing any covenant intended to limit the form of erections on the land either in the sort of buildings, the entire freedom from buildings, or the locality of buildings. See in addition to the cases already given, *McLean v. McKay*, 5 P. C. 327; *Lord Manners v. Johnson*, 1 Ch. D. 673; *Richards v. Revett*, 7 Ch. D. 224; *Taite v. Gosling*, 11 Ch. D. 273; *King v. Dickeson*, 40 Ch. D. 596; *McKenzie v. Childers*, 43 Ch. D. 265; *Bowes v. Law*, 9 Eq. 636; *Harrison v. Good*, 11 Eq. 338; *Kemp v. Bird*, 5 Ch. D. 549, 974; *Hall v. Box*, 18 W. R. 820; *Russell v. Baber*, 18 W. R. 1021; *Renals v. Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866.

Of course the covenants to sell the land on certain occurrences could not be theoretically objected to, as they would represent a clear equitable charge upon the land itself, so as to necessitate its becoming a simple trust in the hands of any holder with notice; as in the case of *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421, and *L. & S. W. Ry. v. Gomm*, 20 Ch. D. 562, both stated above, provided, of course, the rule against perpetuities be not offended against.

And many more covenants may be discovered which may be construed properly as easements. Thus in *Moreland v. Cook*, 6 Eq. 252, original owners had divided land subject to the agreement to maintain a seawall, and Lord Romilly allowed the assignee to bring a bill to compel another assignee to pay his half of the repairs. It is probable that Lord Romilly let this run on the main principle, afterward repudiated, that the burden of a covenant would run with the land; but as such a right to have seawalls maintained seems sometimes to have been acquired by prescription at Common Law (see

The King v. Commissioners of Sewers of Essex, 1 B. & C. 477), there is good reason to hold it the subject of an easement and enforceable as such in equity. And so perhaps the court in England might treat a covenant to fence in the same way. Indeed it might have been more satisfactory if the courts in establishing the theory of equitable easements, had fortified themselves by taking Mr. Justice Holmes' theory that all covenants were but easements, active or inactive, for they could then have been charges on the land. But while the covenant in *Morland v. Cook* was a covenant to repair the seawall, it is by no means certain that the English Courts would enforce a covenant to repair. In two Massachusetts cases, where the opinions were delivered by Mr. Justice Holmes, there was a tendency to treat an obligation to repair, like an obligation to fence, as a spurious easement, *Middlefield v. Knitting Co.*, 160 Mass. 267, and *Norcross v. James*, 140 Mass. 188, the latter pointing out the old English tendency to liken repairs to estovers and other rights of common. 5 Rep. 24 a. b.; F. N. B. 127; *Brett v. Cumberland*, 1 Roll. Rep. 359, 360; *Ewre v. Strickland*, Cro. Jac. 240, etc.; *Hyde v. Dean of Windsor*, Cro. Eliz. 552, 553. And so Mr. Justice Holmes, H. C. L., p. 402, says: "It has already been observed that an easement of fencing may be annexed to land, and it was then asked what was the difference in kind between a right to have another person build such structures, and a right to have him repair structures already built."

But however the modern English Courts might acknowledge the obligation to repair a fence, they are unwilling to let the reason fall away and carry a covenant to repair generally any sort of structures. *Hayward v. Brunswick Building Society*, 8 Q. B. D. 403, decided that a covenant to repair buildings on land received charged with a ground rent, could not bind the assignee; for Lord Justice Brett said: "I think . . . that *Cox v. Bishop*, 8 DeG. M. & G. 815, 26

L. J. Ch. 389, shows that a court of equity has refused to extend the rule of *Tulk v. Moxhay* in the direction contended for, and that if we decided for the plaintiff we should have to overrule that case," though the court was considering the case merely as antagonistic to the limitation to restrictive covenants, and did not refer to the idea of a spurious easement. And in *Austerberry v. Oldham*, 29 Ch. D. 750, the Court of Appeal held that it could not thus enforce the covenant to repair a road, where Lord Justice Cotton said of *Morland v. Cook*, "So although in terms it was a covenant, it was a covenant by three parties that the expense should be paid out of their proportions of the land by an acre-scot payable thereout in the same proportions in ready money. That is, therefore, really a grant by each of the parties of a rent charge of so much money as would be equivalent to his proportion of the total expense of repairing the seawall." So there is very little chance to explain the anomalous equitable easement even by adopting the other historical theory that all covenants are easements at Common Law.

Of course the covenant or agreement to pay a rent charge would be binding upon the holder of the land with notice under the ordinary principles of equity; and of the same nature would be the American agreement to pay half the cost of a party-wall. *Sharp v. Cheatham*, 88 Mo. 498, *Maine v. Cumston*, 98 Mass. 317.<sup>1</sup> And, indeed, it would therefore make no difference whether the covenant so made affected the particular land or any other land of the covenantor, as he could create an equitable charge on any land. In *Daniel v. Stepney*, L. R. 7 Ex. 327, A leased coal land to B, who covenanted that if rent was not paid A might distrain on this land or other lands of B. B sold the other lands to the defendant with notice of the agreement, and on B's

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<sup>1</sup> For a full discussion of this case see *supra*, p. 191.

failure to pay the agreed rent A sought to distrain upon the lands in the hands of the defendant. On trespass brought, A sought to set up the covenant as an equitable plea. The court held that the covenant could not bind these lands, however it might bind the lands received from A; but on appeal to the Exchequer Chamber, L. R. 9 Ex. 185, the judgment was very properly reversed.

But however questions involved in the cases on equitable easements may trouble the student, or cause great doubt as to the decisions in new jurisdictions, the English Courts have reduced the whole matter to the question whether the covenant is restrictive or not. If the covenant is one which limits the covenantor's use of his land so that a court of equity can enforce it by an injunction, it may be pretty well accepted that one can enforce his claim by the aid of the court. In *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403, Lord Justice Brett said: "Now the equitable doctrine was brought to a focus in *Tulk v. Moxhay*, 2 Phil. 774, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here that all covenants also which impose such a burden on the land as can be enforced against the land, would be enforced. Be that as it may, a covenant to repair is not restrictive, and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any court has gone farther than this, and yet if the court would have been prepared to go further, such a case would have arisen." And Lord Justice Cotton said: "We find that they have been invariably enforced if they have been restrictive, and that with the exception of the cove-

nants in *Cooke v. Chilcott*, only restrictive covenants have been enforced." The court then disapproved *Cooke v. Chilcott*. And again in *Austerberry v. Oldham*, 29 Ch. D. 750, the question being on a covenant to maintain a road, and whether the principle of *Tulk v. Moxhay* could be applied to it, Lord Justice Lindley said that after the two decisions of *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403, and *London & South Western Ry. Co. v. Gomm*, 20 Ch. D. 562, that argument was untenable.

The old case of *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27, might be taken as the basis for another doctrine. That was a case where a bill to enforce the cleaning of a water course granted by the defendant's assignor with a covenant to cleanse, was allowed to the grantee's eventual assignee. The court held that it was a covenant running with the land on both sides. But of this Lord Justice Lindley said in *Austerberry v. Oldham*: "In the first place it is quite plain that there the plaintiff had a cause of action; he was entitled to an injunction of some sort to restrain the defendants from interrupting his water course. The right of the plaintiff to enforce specifically the covenant to repair, or rather to cleanse the water course is obscure, and we have not got the decree which was pronounced; and I confess that having only that short note of it which is to be found in *Equity Cases Abridged*, I fail to understand the exact grounds of that decision, specifically enforcing that covenant to cleanse. I doubt whether it was a decision to that effect; but the case is too loosely reported to be a guide on the point."

One of the principles proceeded upon all along was, we see, that there was no way in equity to enforce any but a restrictive covenant. But even after the recognition of the power of the court to grant mandatory injunctions Lord Justice Brett thought that in spite of this, to enlarge the rule would be to make a new equity, and that they could not do. *Haywood v. Building Society* (*supra*); and see *London &*

So. W. Ry. v. Gomm, 20 Ch. D. 562; *Austerberry v. Oldham* (supra). In *Andrew v. Aitken*, 22 Ch. D. 218, together with a covenant that a ground rent should issue, was a covenant to build houses to insure the rent, and the court held that probably the covenant bound the assignee to the extent of allowing building, but would not hold him to do the building himself.

The running of the benefit of the covenant in equity, of course occasions no difficulty. If the burden is granted the person intended to take advantage of it would have rights aside from any notion of covenant or the legal running of the covenant with the land. Thus Lord Justice Selwyn said in *Keats v. Lyon*, L. R. 4 Ch. 218: "The questions which have arisen with respect to the devolution of the benefit of covenants of this kind have been decided upon similar principles, and equally without reference to any technical distinctions depending upon covenant running or not running with the land." See also *Whatman v. Gibson*, 9 Sim. 196; *Renals v. Cowlshaw*, 9 Ch. D. 125; *Shreiber v. Creed*, 10 Sim. 9; *Child v. Douglas*, Kay 560, 5 DeG. M. & G. 739; *McLean v. McKay*, 5 P. C. 327; *Lord Manners v. Johnson*, 1 Ch. D. 673; *Taite v. Gosling*, 11 Ch. D. 273; *Tyndall v. Castle*, 1893, W. N. 40; *Harrison v. Good*, 11 Eq. 338; *Hall v. Box*, 18 W. R. 820.

The American Law as to the rights and obligations in equity is not so clearly defined, because the rights in law have been so generally indorsed; and wherever the court would recognize the running at law, of course the covenantee would get rights in equity to enforce the same covenant. *Muzzarelli v. Hulshizer*, 163 Pa. 643; *Bald Eagle Valley Ry. v. Nittany Valley Ry.*, 171 Pa. 284; *Avery v. Ry.* 106 N. Y. 147; *McMahon v. Williams*, 79 Ala. 288. But the notion of equitable easements has not been uncommon, although it has not been set out with the precision found in the English Cases. The courts frequently speak of the ease-

ment as if it were a distinct easement at law, and at the same time do not entirely cast away the idea that it was a covenant running with the land. In *Sharp v. Ropes*, 110 Mass. 381, in considering the enforcing in equity of a building restriction the courts said: "It is undoubtedly true, and has often been decided, that where a tract of land is divided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as inducements to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee."

Whether the court had in mind a fully legal easement or merely an equitable easement is hard to decide.

In *Mott v. Oppenheimer*, 135 N. Y. 312, a party-wall agreement was held to run with the land because so intended and either to constitute a Common Law obligation or a lien on the land. The New York court had already fully endorsed the doctrine of *Tulk v. Moxhay* in carefully worded language in *Tallmadge v. East River Bank*, 26 N. Y. 105. But in *Trustees of Columbia College v. Lynch*, 47 How. Pr. (N. Y.) 273, an injunction was refused to restrain building on an adjoining piece of land because the covenant had not accompanied a grant of land, when it would be apparently unnecessary to prove a grant if the covenant rested upon an equitable charge of an easement and had nothing to do with covenants running with the land. Compare also *Brew. v. Van Deman*, 6 Heisk. 433, and *Martin v. Martin*, 44 Kan. 235.

Nor does it appear that the American courts are all agreed in limiting the equitable doctrine of a charge to restrictive covenants. In *Countryman v. Deck*, 13 Abb. N. C. 110, the covenant to fence was enforced by an injunction; and *Lydick*

v. B. & O. Ry., 17 W. Va. 427, held that the covenant to maintain a switch did not run at law, for want of consideration, but indicated that covenants parole not running at law might be enforced in equity if of the nature to run. This discussion was mere dictum, however.

Several cases, apparently the enforcement of covenants not restrictive, may be explained as merely involving equitable charges upon the land, and so clearly enforceable. It must be admitted, nevertheless, that the courts have not always clearly put them upon this satisfactory basis. Carson v. Percy, 57 Miss. 97, was a case where the owner of a plantation along the Mississippi River granted the plaintiff a strip of it for a wharf with a covenant to deed him more if the part granted should cave away. The plaintiff's bill for specific performance was held enforceable against assignees with notice. It might very well be an agreement to sell on a certain future contingency, and so a charge upon all the land; but in that sense it is surprising that the defendant did not set up the rule against perpetuities. The operation of this rule was happily avoided in Van Doren v. Robinson, 16 N. J. Eq. 256, where the grantee of land had covenanted to resell to the plaintiff if she, the grantee, should cease to occupy the land, or that her heirs or assigns should resell it on her death. The court held the covenant not to run with the land, but to bind an assignee taking with notice. The sale back would have to take place during or at the end of a life in being, and thus there would not be a perpetuity. Similarly a mere equitable charge was involved in Nye v. Hoyle, 120 N. Y. 195, where the covenant to bear a share of the cost of repairing a dam was enforced in the form of a bill to have the amount due the plaintiff refunded. The case might well have been handled as Lord Justice Cotton handled Morland v. Cooke in Austerberry v. Oldham (*supra*).

Of course this applies, too, with full strength to party-



wall burdens and perhaps to covenants for fencing, as has been suggested above. *Martin v. Martin*, 44 Kan. 295, also must have been so regarded by the courts. A son on taking land from his father agreed that his father should receive support. The court of equity said it was a "covenant running with the land," a "condition subsequent," &c., but clearly all that was meant was that it was a charge for support upon the land. A similar conclusion was reached in *Goudy v. Goudy*, *Wright* (Ohio) 410; but apparently contrary decisions are *Harkins v. Doran*, 15 Atl. Rep. 928 (Pa.), and *Divan v. Loomis*, 68 Wis. 180.

In *Bald Eagle Valley Co. v. Nittany Valley Co.*, 171 Pa. 284, a different principle was involved. There a land company had covenanted to give the plaintiff railway all the land company's traffic, and the land company having assigned, an agreement was made by the assignee with the defendant railway company to build another road, but an injunction restrained this railway from doing so. As the covenant could hardly be either a charge upon the land or a restriction, the court had to discuss the sole question whether the covenant would run, and the equity question was merely the right to prevent a stranger from interfering with it, an entirely different matter.

But on the whole, it may be said that the English notion of restrictive covenants as equitable easements has been very generally accepted in America as a theory independent of the legal notion of the covenant running with the land; and it is often enforced in jurisdictions which allow the legal running of covenants at the same time. *McMahon v. Williams*, 79 Ala. 288; *Mithoff v. Hughes*, 5 O. C. C. 120; *Clark v. Martin*, 49 Pa. 289; *Muzzarelli v. Hulshizer*, 163 Pa. 643; *Landell v. Hamilton*, 171 Pa. 327; *Hills v. Miller*, 3 Paige 254; *Winfield v. Henning*, 21 N. J. Eq. 188; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Lewis v. Gollner*, 129 N. Y. 227; *Bradley v. Walker*, 14 N. Y. Supp. 315; *Post v. Weil*,

115 N. Y. 361; *Raynor v. Lyon*, 46 Hun 227; *Watertown v. Cowen*, 4 Paige 510; *Dexter v. Beard*, 7 N. Y. Supp. 11; *Haynes v. Ry.*, 38 Hun 17; *Trustees of Columbia College v. Lynch*, 47 How. Pr. 273; *Coudert v. Sayre*, 19 Atl. Rep. 190 (N. J.); *Coughlin v. Barker*, 46 Mo. App. 54; *Degray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329; *Bricker v. Grover*, 10 Phila. 91; *Clement v. Putnam*, 68 Vt. 285; *Parker v. Nightingale*, 6 Allen 341. But in *Tardy v. Creasy*, 81 Va. 553, the court refused to enforce a restrictive covenant, assigning among other reasons that no charge could be enforced in equity which could not be made the subject of a grant at law. The force of this conclusion does not seem to have struck any other court.

An extreme case of restrictive covenants is *Hodge v. Sloan*, 107 N. Y. 244, where the covenant not to sell sand was enforced by an injunction. But a similar covenant was disregarded in *Brewer v. Marshall*, 18 N. J. Eq. 337, and 19 N. J. Eq. 537, and in *Kettle River Ry. v. Eastern Ry.*, 41 Minn. 461; so that it may well be added that a mere restrictive covenant is not enough in itself to run. Like every other covenant it must touch or concern the land. In *Brewer v. Marshall* the court say that a covenant to run must be for something on the land or concerning the land; and in *Kettle River Ry. v. Eastern Ry.* it is said that while equity would sometimes enforce what the law would not, equity would enforce only covenants that related to the land.

In regard to naming the successors of parties to an agreement constituting an equitable easement, it may be said that whatever idea may be accepted at law as to the full binding effect of the instrument which creates the covenant, and the necessity to name the parties who are to be affected by it, in equity it is universally recognized as enough to indicate a clear intention to charge the property whether orally or by instrument; and the court will determine who are to take advantage of it according to the implied intent of the par-

ties. In *Tulk v. Moxhay* Lord Cottenham said he would enforce the agreement whether parole or under seal, and it was so clearly expressed by all his successors. Vice-Chancellor Hall, in *Renals v. Cowlishaw*, 9 Ch. D. 125, said "this right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be clearly established." "And such covenant need not be express, but may be collected from the transaction of sale and purchase." In *Peck v. Conway*, 119 Mass. 546, the agreement was only a plan showed to the purchasers and marking off building restrictions; and for other instances see *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135; *Parker v. Nightingale*, 6 Allen 341; *Bimson v. Bultman*, 3 App. Div. (N. Y.) 198; *Hall v. Geyer*, 14 O. C. C. 229.

Nor need the agreement be a part of the transaction of conveyance. A development of the theory consequent upon its resting upon equity principles only is that the agreement has been often merely collateral. *Carter v. Williams*, 9 Eq. 678; *Hills v. Miller*, 3 Paige 254; *Watertown v. Cowen*, 4 Paige 510; *Lydick v. B. & O. Ry.*, 17 W. Va. 427. But it must always be clear that the obligation was intended to be for the benefit of subsequent purchasers on the one hand, or to bind assigns on the other hand } *Badger v. Boardman*, 16 Gray 559; *Jewell v. Lee*, 14 Allen 145; *Skinner v. Shepard*, 130 Mass. 180; and for this all the circumstances will have to be considered. *Shreiber v. Creed*, 10 Sim. 9; *Keats v. Lyon*, L. R. 4 Ch. 218. So several cases on party-wall agreements limit the obligation to the original parties, as it seemed so intended. *Scott v. McMillan*, 76 N. Y. 141. *Wilson v. Hart*, 1 Ch. 463, seems, therefore, a curious decision. A vendee covenanted not to erect a beer shop, and the court held that it was not intended to bind the land, but was merely personal; yet it was held that a lessee with notice was bound to observe the agreement.

So if a collateral agreement can run if intended to do so,

since the equitable notion involves none of the technicalities of the old law, it would seem unnecessary that any land should pass between the contracting parties; for any owner of land can contract so as to charge it in equity with the obligation usually embraced in the covenants. The English courts have given us no discussion of this so far; but it seems to have been endorsed in America. Thus it very often happens that the vendor of land exacts building restrictions of a vendee of his lots without inserting any similar agreement for himself as to the remainder of the land. The vendees would not, therefore, be within the technical running of the covenants as to each other; but it is generally very clear that the vendor intended every vendee to have the benefit of the restriction, for it is rarely contemplated that the vendor, usually a land company, shall retain any of the lots whatever. So if the vendees respectively cannot enforce the restriction, it might in time be unenforceable entirely. That this would be the result was decided in *Dana v. Wentworth*, 111 Mass. 291. There "the owner of a parcel of land bounding on a street conveyed it by a deed with a condition that the grantee or his heirs or assigns, should not build on the land within eight feet of the street. The grantee conveyed the land in several lots. It was held that the grantor could not maintain a bill in equity, for the benefit of the owners of some of these lots to restrain the owner of another from violating the condition, in the absence of evidence that the condition was imposed as part of a general plan for the benefit of the land granted, and of other land on the street."<sup>1</sup> This contingency was in the mind of the court in *Tallmadge v. East River Bank*, 26 N. Y. 105. *Sunderland, J.*, said: "It is probable that the equity arising from the circumstances and assurances under which the lots were sold . . . was mutual . . . and hence, that it would be easy to show

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<sup>1</sup> The abstract of this case is taken from the second volume of *Mr. John C. Gray's Cases on Property*, p. 508, note.

that the equity was mutual as between his grantees, without regard to priority of conveyances, so that the equity would or might exist in favor of a subsequent grantee against a prior grantee, as well as in favor of a prior grantee against a subsequent grantee; but it is unnecessary in this case to examine or decide that question." See also *Parker v. Nightingale*, 6 Allen 341; *Jeffries v. Jeffries*, 117 Mass. 184; *Tobey v. Moore*, 130 Mass. 448; *Barron v. Richard*, 8 Paige 351.

The difficulty in these land company cases was rather violently avoided in *Bimson v. Bultman*, 3 App. Div. (N. Y.) 198, by deciding that the oral imposition of a restriction upon any one purchaser implied a similar restriction upon the remaining land, so the case of one purchaser being restricted without all others being so was not likely to arise. Whether such an implication could be made, however, when the restriction against the purchaser was in writing, may well be doubted, for though not contradicting the writing, it would be violently adding to it. But in *Jewell v. Lee*, 14 Allen 145, the Massachusetts court seemed to think that no restrictive covenant could be enforced unless the benefits were reciprocal. But the strongest decision that the benefits need not be confined in equity to those in succession from the covenantor after the creation of the agreement, is *Wingfield v. Henning*, 21 N. J. Eq. 188. The facts were the same as in *Dana v. Wentworth* (*supra*); but one of the subgrantees sought to enforce the restriction against another. The court very properly allowed the plaintiff his injunction, saying: "An action at law could not be maintained by the complainant against the defendant on such a covenant. But in equity their position is different. Both the parties are bound to the grantors in the Coles deed to keep the front free from buildings: each is subject to the easement over his lot in favor of those subsequently deriving title from Coles, and each is equitably and justly entitled to the advantage which

the observance of this stipulation by his neighbor may be to him. . . . It seems equitable that the court should, at his instance, compel the observance of this covenant." Coles was the original grantor; and all had notice.

These cases would seem to furnish ground enough to say that no transfer need exist between the original parties to the agreement if it is clear that they intended to charge the lands for their successors; and if that proposition is established, since one can charge in equity after acquired lands as well as presently owned lands, it would seem unnecessary that the covenantor should own any land at the time of his covenant. He could charge any future possessions he might have, and they would be equitably bound when they should come into his hands. The covenant has thus been assimilated to an equitable mortgage on future acquired property. This was done in *Lewis v. Gollner*, 129 N. Y. 227. G had a contract for a lot, and was to put up a flat upon it, when the plaintiff bought his contract from him, G agreeing that he would not erect any flats in the plaintiff's immediate neighborhood. This contract seems to have been by parole. Later G bought another plot of ground near by and began the erection of a flat, but sold it to his wife with notice, and continued to operate for her. The plaintiff was allowed to enjoin her from building a flat. The court held the contract merely personal, but one that attached to the land as an equitable right as soon as the land was bought, so that it ceased to be merely personal because it was intended to affect the use and occupation of after-acquired land in that neighborhood; and though the contract might remain personal, the contract equity followed the land into the hands of a purchaser with full knowledge of the facts.<sup>1</sup>

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<sup>1</sup> It was similarly held in *Nat. Bk. of Dover v. Segur*, 39 N. J. L. 173, that the benefit of a covenant ran at law when executed before the land passed. In N. J. burdens of covenants do not run at law. See *Supra*, Ch. VII.

In the consideration of the nature of an equitable restrictive

Of course it is not necessary that the equitable right originally created should be referred to as a renewed contract in each reassignment. If the various parties taking have notice of the circumstances the rights derived from the first conveyance can be enforced. *King v. Dickeson*, 40 Ch. D. 596; *Winfield v. Henning*, 21 N. J. Eq. 188. It would therefore follow that it is immaterial whether notice come from the grantor or from extraneous sources.

But how about the rights of a new assignee purchasing with notice from an assignee who held without notice of the burden or benefit? This can best be answered after a fuller consideration of the whole matter of notice.

In *Keppell v. Bailey*, 2 M. & K. 517, the first case which fully repudiated the running of covenants at law, Lord Brougham, L. C., said that notice to the assignee would be immaterial; for to allow notice to continue the covenant would be giving effect to a covenant for whose breach no damages could be recovered. It is evident that Lord Brougham had in mind the common covenant which was either merely personal or ran with the land. It was complete in itself, and could be regarded as nothing else, being incapable of conversion into a different legal charge as an easement, or a grant; and as was seen above, Lord Brougham was perfectly right.<sup>1</sup> He had decided that the covenant was no legal charge, and he did not see how there could be

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covenant, some doubt may arise as to whether it can be an encumbrance upon title. Undoubtedly if there is no notice of it, it has no effect, so it could be no encumbrance. But in cases where A contracts to buy land of B, but finds out the restriction before he receives title, there it would seem that the restriction would affect him if he received title, so he could probably resist a bill for specific performance by setting up an encumbrance. Compare *Halle v. Newbold*, 69 Md. 265.

<sup>1</sup> In *Tardy v. Creasy*, 81 Va. 553, it was stated as the view of the court, one judge dissenting, that these restrictive covenants could not be enforced in equity, as nothing could be a charge in equity which could not be perfected at law.

an equitable charge if a legal charge was impossible. But his successors thought otherwise. Accordingly Lord Cottenham, in *Tulk v. Moxhay*, 2 Phil. 774, disapproved the conclusion of Lord Brougham, though evidently failing to notice clearly Lord Brougham's meaning, and so laid down the doctrine that the covenant could be an equitable charge; and for this of course notice was a necessity.

Again the action in *Keppel v. Bailey*, like most of the occasions on which the question arose in equity, was a petition for an injunction; and the law at the time in England, and indeed the history of the law of injunctions was that no permanent injunction could be granted without an action having been brought first at law; and by hypothesis this could not be done as the covenant would not be cause of action at law. It is strange that this point did not cause comment by Lord Cottenham in *Tulk v. Moxhay*, especially as Lord Brougham had indicated that the claim in *Keppell v. Bailey*, if allowed, would preserve that for which no damage could be gained at law.

After *Tulk v. Moxhay*, then, the whole matter is treated as an equitable charge governed by the rules of equity in connection with charges and trusts; and the rights and liabilities are the rights and liabilities of volunteers or purchasers and holders with or without notice. It is of course not intended here either to summarize or explain those rights and obligations. For that reference must be had to authoritative works upon equity and trusts. It suffices for the present purpose merely to prove that such notice is necessary for an assignee to be held in equity to the burdens of the assignor. [*Whatman v. Gibson*, 9 Sim. 196; *Mann v. Stevens*, 15 Sim. 377; *Tulk v. Moxhay*, 2 Phil. 774; *Cooke v. Chilcott*, 3 Ch. D. 694; *Coles v. Sims*, Kay 56, 5 DeG. M. & G. 1, 23 L. J. Ch. 37, 258; *Wilson v. Hart*, 1 Ch. 463; *Carter v. Williams*, 9 Eq. 678; *Richards v. Revett*, 7 Ch. D. 224; *Taite v. Gosling*, 11 Ch. D. 421; *Renals v. Cowlishaw*,



9 Ch. D. 125, 11 *idem* 866; *King v. Dickeson*, 40 Ch. D. 596; *McKenzie v. Childers*, 43 Ch. D. 265; *Tyndall v. Castle*, 1893, Wkly. N. 40; *Everett v. Remington*, [1892], 3 Ch. 148; *Bowes v. Law*, 9 Eq. 636; *Hall v. Box*, 18 W. R. 820; *Harrison v. Good*, 11 Eq. 338; *Mithoff v. Hughes*, 5 Ohio C. C. 120; *Ry. v. Bosworth*, 41 Ohio St. 81; *Carson v. Percy*, 57 Miss. 97; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Vandoren v. Robinson*, 16 N. J. Eq. 256; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Lewis v. Gollner*, 129 N. Y. 227; *Bradley v. Walker*, 14 N. Y. Supp. 315; *Ritzman v. Spencer*, 5 Pa. Dist. Ct. 224; *Richardson v. Tobey*, 121 Mass. 457; *Hall v. Newbold*, 69 Md. 265; *Coughlin v. Barker*, 46 Mo. App. 54; *Heidorn v. Wright*, 6 Ohio Dec. 315; *Bricker v. Grover*, 10 Phila. 91.

In American courts which recognize the running of the burden of the covenant at law, the equity question could arise only where the agreement was by parole and of such a nature as not to bind the assign anyway at law. Where it would bind at law of course notice would not be necessary to make it binding in equity. One or two cases have been so worded as to imply a necessity for notice of the burden to have it run at law. *Ritzman v. Spencer*, 5 Pa. Dist. Ct. 224; *Standish v. Lawrence*, 111 Mass. 111 (*semble*). But it is believed that the idea arose from confusion. It would certainly seem that such a notion is not to be supported.

But notice is not always necessarily express. Any circumstance which puts the defendant reasonably in default for not having examined the state of the property, might give him constructive notice of such an obligation or restriction as is included in the covenant; and he is held equally bound to observe it. *Wilson v. Hart*, 1 Ch. 463.

So even if the covenant be held merely a personal one, as the covenant to resell on the grantee's ceasing to occupy. *Vandoren v. Robinson*, 16 N. J. Eq. 256. But in the absence of a recorded deed, the mere occupation of property

will not give notice of an unusual burden, as the burden of fencing. *Ry. v. Bosworth*, 46 Ohio St. 81. So it has been several times held that one has constructive notice of any restriction contained in any deed through which he claims title. *Peck v. Conway*, 119 Mass. 546; *Poage v. Wabash Ry.*, 24 Mo. App. 199; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Heidorn v. Wright*, 6 Ohio Dec. 315. In the absence of registration such a conclusion seems somewhat strong, however. It is very rare that the agreement or stipulation is not inserted in the first deed made subject to it; so the proposition amounts to saying that the burden of any restrictive covenant or stipulation will run, whether the assignee has notice or not, merely because it was in some remote deed to the property. That destroys the whole notion of equitable claims and is probably very foreign to the ideas of those judges who established the first conception of the right.

But all questions of implied notice are of little importance compared with the question how far the registration statutes in America have eliminated entirely the matter of notice in equitable easements. If the registration of a deed causes notice to all subsequent purchasers of the covenants it contains, as well as of the actual existence of the deed,—as, indeed, is probably law under most of the registration statutes: *Richardson v. Tobey*, 121 Mass. 457; *Norfleet v. Cromwell*, 64 N. C. 1,—then the result is that an equitable easement, by means of the record, is the same as a covenant which runs with land at law. How far-reaching this would be, the courts will have to determine, as they have not done so hitherto.

To recur, then, to the obligation of the person who has notice taking from one who received without notice. The person who receives without notice is found to hold absolutely free of obligation either upon the land or upon his conscience, and there can be no gainsaying that he is pre-

sumed to have paid the value of the property. To hold, then, that one who happens to have notice cannot receive the title free from him, would be to limit that vendor's free use of the property, as he could hardly get full value. It is therefore believed that after the title is once held free from equities no equities can again revive, unless, indeed, it be repurchased by some prior fraudulent vendor. See Ames' Cases on Trusts, 2 ed., p. 286, note.

But on the side of the beneficiary the same reasoning does not apply. It has been stated by some judges that the persons benefited must have notice of the benefits of the covenant. Probably the first party must have notice, or there will be no agreement to start; but when once begun, why should his assignee have to receive notice at the time of assignment in order to have the benefits of the charge? It has been frequently said that purchasers are presumed to have regarded the covenant as part of the inducement to invest. *Tallmadge v. East River Bank*, 26 N. Y. 105; *DeGray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329. But if the charge is entirely a matter of intention by the covenantor, and the benefit runs or not as he had intended, as we have seen, why should an assignee's knowledge or ignorance be material? The grantor who assigns to him cannot retain the benefit, for the covenantor did not intend him to have the benefit of the covenant except during his holding of the benefited land. Moreover, it would not seem important if one assign remained entirely ignorant of his benefits during his whole period of holding, and his assign first discovered the prior right. There would seem no reason why he should not enforce it.

But a different form of the question arises in considering whether the covenant can be extinguished before an assign has notice or before it reaches him. The point arises in the power of a land company to release business restrictions after having sold parts of the land for the benefit of which

the restriction was imposed. Of course this would not affect agreements which run with the land at law as in *Raynor v. Lyon*, 46 Hun 227. But in *Keats v. Lyon*, 4 Ch. 218, the facts arose in England where the covenant at law would be impossible. Yet the court treated it as a matter of intention, and so we have no decision on the point whether the equity could be released as to those assignees who had no notice. The principle, however, would seem to be that the agreement is a contract by which the covenantor undertakes to charge his land for the benefit of the other party or the other party's assigns. The contract can be destroyed, of course, whenever the parties to it shall desire; and all future rights can be cut off. *Lydick v. Ry.*, 17 W. Va. 427. But the covenantor has already charged the property for those to whom the covenantee has already assigned; and this being complete in equity, would seem irrevocable, just as a trust is irrevocable when completely declared whether the cestui has notice of it or not.<sup>1</sup> That the equity claim cannot be destroyed where there is notice to those who have already purchased, see *Coudert v. Sayre*, 19 Atl. Rep. 190 (N. J.). This working similarity to the law of trusts on the benefit as well as the burden side of covenants is therefore apparent.

On this principle of trusts and equitable charges the beneficiaries get their claim directly against the covenantor by the nature of the original agreement, and do not at all claim through the contractual relation between the original parties, although that gave rise to the beneficiaries' rights. It will be noted that no difficulty presents itself in equity upon the interpretation and analysis of the covenants themselves. It would seem to follow from the language of decisions in the English courts that this was their view of the notion of equitable easements. It is at first natural to consider the rights as arising entirely from the contract itself,

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<sup>1</sup> See cases collected in *Ames' Cases on Trusts*, 2d ed., p. 233.

and thus to hold the covenantee as trustee of the claim for his subsequent assigns. That a cestui in fact has the right in equity to enforce by injunction the covenant with his trustee was decided in *Eagle Valley Ry. v. Nittany Valley Ry.*, 171 Pa. 284. But an extension and multiplication of trusts along that line is both unnecessary and likely to give rise to difficulties as involved as the analysis of the rights of parties to parole agreements at law.

Considering, then, that these peculiar rights in equity exist, it must be asked again how thoroughly they may be enforced by the courts. Where the charge is the obligation to pay money, of course there is no reason why it should not be enforced to the full extent; and it seems that this is the law. Such are the cases of party-wall agreements, where the charge is for an express sum; and some courts have gone so far as to allow the action for that in contract as a liquidated claim at law. See *Maine v. Cumston*, 98 Mass. 317, and compare *Standish v. Lawrence*, 111 Mass. 111; *Joy v. Boston Penny Savings Bank*, 115 Mass. 60. But when the subject is a real easement it would ordinarily be questioned whether the defendant had really entrenched upon the plaintiff's easement, and whether equity would grant relief. In *Hills v. Miller*, 3 Paige 254, however, the court held that as there was an easement, the court would enforce the right though the plaintiff was unreasonable. Whether such strict enforcement would always be granted may well be doubted. In *Clark v. Martin*, 49 Pa. 289, abatement of a building erected beyond the agreed line was ordered, though admittedly harsh; but in that case the building was entirely erected in disregard of the motion to enjoin already made.

But the chief interest arises in connection with restrictive covenants purely, after circumstances have arisen so as to make their enforcement exceedingly harsh. Such is the situation which led the Pennsylvania court to hold that the running of the covenant depends entirely upon the intention

of the parties even as to the time that it is to run; and that equity will not presume that it was the intention that the property should be burdened long after the usefulness had ended. *Landell v. Hamilton*, 175 Pa. 327. That such an intention is possible, is to be admitted, and that it is eminently desirable that it be discovered, cannot be doubted. Indeed, it would not be unwise always to insert some clear expression of intention in every restrictive agreement. But it is exceedingly probable that such an intention would ordinarily be a judge-made contract for the parties. The parties ordinarily have no intention on the subject; and from the circumstances which give rise to the covenant any intention that exists would probably be that it should run in perpetuum.

But even at best, the intention only partially relieves matters; for often before the usefulness to the covenantee has expired, the burden to the covenantor is out of proportion. Yet the court in *Landell v. Hamilton* was compelled to say: "Where the restriction, notwithstanding the change of use of lands and buildings, still is of substantial value to the dominant lot, equity will restrain its violation, where relief is promptly sought."

On the whole, therefore, the safer method would seem to be to eliminate intention entirely and treat the whole question as a matter of equity jurisdiction. Where the breach would injure the plaintiff materially, and the agreement does not cause unreasonable restrictions under an enhanced burden to the defendant, equity would be but fulfilling its duty to enforce the agreement. But where conditions have so changed since the creation of the covenant that the damage to the servient tenement would be out of all proportion to what it had formerly been, or to the benefit to the dominant tenement, it would seem a distortion of the office of equity to aid in imposing such injustice. The learned judge in *Landell v. Hamilton*, 175 Pa. 327, continuing on this ground,

said: "There may, and doubtless will occur cases where the restriction has ceased to be of any advantage. In such cases equity will not interpose and retard improvements, simply to sustain the literal observance of a condition or covenant." In *Sayers v. Collyer*, 24 Ch. D. 180, a restrictive covenant was not enforced because it would be inequitable to do so under the changed condition of circumstances. And in *Knight v. Simmonds*, [1896], 2 Ch. 294, the court held that a covenant would not be enforced when its purpose no longer survives. See also *Duke of Bedford v. Trustees of British Museum*, 2 M. & K. 552; *Coughlin v. Barker*, 46 Mo. App. 54; *Coudert v. Sayre*, 19 Atl. Rep. 190 (N. J.); *Trustees of Columbia College v. Thatcher*, 87 N. Y. 311.

Again the plaintiff must use due diligence in bringing his cause before the court. If his tardiness amounts to laches, he will be put out of court as in other claims in equity. *Sayers v. Collyer*, 28 Ch. D. 103; *Landell v. Hamilton* (supra); *VanDoren v. Robinson*, 16 N. J. Eq. 256. For these questions it is enough to suggest the rights discovered by the courts in the cases. For their elaboration it is of course necessary to refer at once to works on equity jurisdiction from whose realm the essayist would here studiously refrain.

And in conclusion let it be said that wherever the theory of equitable easements has become established, and whenever in a new jurisdiction an advocate shall assume the responsibility to recommend it to the courts, it must be recognized as necessary that it be considered and argued only upon well-known principles of equity entirely apart from the Common Law, or the law will become so confused as to be more inextricable than any other question in the local law.

## CHAPTER XII.

### OF OMITTED MATTERS, AND CONCLUDING SUGGESTIONS.

It is to be regretted that other interesting points about covenants cannot be elaborated in proportion to the pleasure to be derived from following them out. But as many of these points have never been presented to the courts, it would seem clear that their occurrence even to the practitioner would be too infrequent to warrant their treatment in a book;—especially as it is thought that the principles already discussed must be the basis for settling any new matter. One of the most interesting of these points is whether a covenant can be executed to run with land hitherto to be acquired. This has been partially considered by the courts and the running endorsed in at least two cases, in the matter of the running of a benefit in *Nat. Bk. of Dover v. Segur*, 39 N. J. L. 173; and in the matter of the running of a burden in *Lewis v. Gollner*, 129 N. Y. 227. The latter case was in equity, however, where there should be no doubt of the running of either the benefit or the burden of certain covenants, provided the court has reason to enforce them. See Chapter XI.

On principle it will be apparent that the capacity to run would depend upon the ability to grant the property in futuro, with which the covenant is to run, as it has been concluded in Chapter IX that for any covenant to run there must be the passing of property at the time of the creation. Of course the original parties could contract to sell any land, and if the contract was concluded, either by the original contracting parties, or by assignees of the contract, that particular contract when carried out would carry the covenant.



But this is not exactly what is meant. What is meant is whether the covenant can be made now to attach to land in futuro and then run. As by the Common Law land could not be granted in futuro (see any work on real property), covenants could probably not be executed to run in future with fees. But as easements could be granted in futuro, there seems no reason why party-wall covenants could not be executed when the easement in futuro is granted, to run when the easement passes. And so of any covenant which runs with easements. But the reader must work it out for himself when occasion arises.

Another matter which has been almost entirely omitted is the operation of powers in connection with the running of covenants with fees. Powers were discussed in connection with covenants in leases, however, and very probably any principle involved in their operation upon covenants running with fees is there covered.

But the two large subjects frequently treated fully in law books on any subject, and omitted here, are Election of Remedies and Damages; and their systematic and separate statement might save the investigator some time. But to do so in the case of the former would be to rehearse the book; and to do so in the case of the latter has seemed unadvisable. With regard to damages, it will be seen that the question when applied to covenants is merely the question of damages upon the breach of a simple contract. It involves no more nor less the peculiarities of damages in breach of contracts, and had best be investigated in some work on that subject. There are probably more cases of covenants than of other contracts where the amount of damages is immaterial, the question being the existence of a right, and in actions to enforce this right, nominal damages are all that is to be expected; but these cases will be apparent on their presentation in practice.

With regard to the election of remedies, it will be noted

that it has all along been urged that in law there is only one remedy for the right created as a covenant, and that is to sue upon it as an ordinary covenant. When to regard the right as an easement or some other form of law affording a different remedy can only be intelligently stated by reviewing the preceding chapters, and then a statement might be misleading. In equity there seems more room for choice in cases where the covenant may be regarded either as a covenant or as an equitable easement; but as may be drawn from the discussion in Chapter X, Section 5, this alternative is possible only where the courts probably have misunderstood the origin of both rights and so have allowed them both.

The real occasion for the election of remedies is when the matter of the covenant is such that it may be regarded either as a running covenant or an equitable money charge. But even here there should be little embarrassment after the status of the law with regard to each is examined. It would arise chiefly in cases of rent granted, or party-wall agreements; and would amount practically to deciding whether to sue at law or in equity; and that would involve no novel questions. The law on the whole question has been discussed more or less fully in the preceding chapters; and the practice in the sense of procedure in addition to being a local question, has not been embraced in the subject matter of this work.

Indeed, it has been sought to explain the principles of covenants which must underlie their use in every condition; and it is thought that if these principles have been carefully examined, there will be little difficulty in determining how they must be applied and when to apply them. If it has been proven, as it was attempted, that covenants are peculiar creations of the Common Law, and run with land as a result of their nature long since developed, practice is an unimportant matter from its very simplicity.

But practice in its true sense of the proper application of legal principles has constituted a very important part of this work. The law of running covenants, like the law of deeds or the law of declared trusts, comes down to the question whether there ever was, in the case at hand, such a covenant. That is to say, whether the covenant was properly created. That is a matter of practice, a matter of conveyancing; and that the author has attempted to treat thoroughly. An epitome of instructions to that end, therefore, may well be the best conclusion of the work.

In fine, to draw a covenant that would be thoroughly good, it is best of course to avoid those points that have caused the law the most trouble. If possible, let there be something of corporeal hereditament to pass; and if not that, have no doubt that there is an expressly granted incorporeal hereditament. Mention the heirs, executors, administrators, and assigns of both parties, and express that it shall run with the land. Let the covenant concern the use or enjoyment of both pieces, and if it be a restrictive covenant state that it shall last until its usefulness is ended. Then let the deed be made an indenture and let the grantor and the grantee both sign it with their seals.



# APPENDIX A.

## FORM I.

FORM FOR AN AGREEMENT AS TO THE BUILDING AND REPAIRING  
OF A PARTY-WALL IN A DEED GRANTING ONE OF THE  
ADJOINING PIECES OF PROPERTY UPON  
WHICH THE WALL IS TO REST.

State of .....,  
County of .....

This indenture, executed this ..... day of .....,  
19..., by and between A. B., of the City of .....,  
County of ....., and State of ....., party of  
the first part, and C. D., of the City of ....., County  
of ....., and State of ....., party of the second  
part, Witnesseth: That whereas the party of the first part  
is seised and possessed in his own right of a certain lot or  
parcel of land, situated in the City of ....., County  
of ....., and State of ....., and designated  
on the map of said city as Lots ..... in Block .....

And whereas the party of the first part has agreed to sell  
to the party of the second part, and the party of the second  
part has agreed to buy from the party of the first part out of  
the land above designated the certain portion or lot herein-  
after described:

Now, therefore, in consideration of ..... dollars  
(\$.....), lawful money of the United States, in hand paid  
to the party of the first part by the party of the second part,  
the party of the first part does grant, bargain, sell, enfeoff,  
and confirm unto the party of the second part and his heirs  
all that lot or parcel of land situated in the City of .....,  
County of ....., and State of ....., designated  
on the plan of said city as Lot ..... in Block ....., and  
more particularly described as follows:

(Here insert metes and bounds.) Being a part of the land of the party of the first part designated above, together with all and singular the hereditaments and appurtenances, rights, or covenants, thereunto belonging or in anyways appertaining:

To have and to hold unto the said C. D. and his heirs, to the use of the said C. D. and his heirs, in fee-simple forever.

And the party of the first part, for himself, his heirs, executors and administrators, covenants with the party of the second part, his heirs, and assigns (for title).

And the party of the first part, for himself, his heirs, executors, administrators, and assigns, covenants with the party of the second part, his heirs and assigns, that if at any time the party of the second part, his heirs, or assigns, should wish to build upon said above conveyed parcel of ground so that one of the walls of said building shall rest, half upon said granted land, and half upon the ground now remaining to the party of the first part, if at that time unbuilt upon, he or they shall be at liberty to do so; and may erect said wall, not to exceed . . . . . inches in thickness or . . . . . feet in height, and said wall shall be a party-wall: and if at any time the party of the first part, his heirs, or assigns, shall use said party-wall as a wall sustaining a building on his or their land, that he or they will, at the time of first so using the wall, pay unto the then owner of the adjoining building supported by the wall one-half the cost of the party-wall to the extent that it is thus used.

And the party of the second part, for himself, his heirs, executors, administrators, and assigns, covenants with the party of the first part, his heirs and assigns, that if at any time the party of the first part, his heirs, or assigns should desire to erect such a party-wall he or they shall be at liberty to do so; and if at any time the party of the second part, his heirs or assigns, should desire to use the party-wall so built, he or they will, at the time of first so using the wall,

pay to the then owner of the adjoining building supported by the wall, half the cost of the wall to the extent so used.

And each party, for himself, his heirs and assigns, covenants with the other party, his heirs, executors, administrators and assigns, that if ever such a wall shall be erected, the owner of the above indicated adjoining lot may use it on the aforesaid terms at any time, and that the wall may be repaired whenever necessary at the joint expense of the adjoining owners using it; and that it may be raised to any extent commensurate with the safety of the building on the said adjoining lot, for the use of any of the parties using, on the same conditions on which it was originally erected.

Witness our hands and seals this the .....day of  
....., 19....

A. B. (Seal.)

Witness:

C. D. (Seal.)

.....  
.....

Dower should be released according to the local statutes regulating its release in the ordinary conveyance.

## APPENDIX A.

### FORM II.

FORM FOR AN AGREEMENT AS TO THE BUILDING AND REPAIRING  
OF A PARTY-WALL, EXECUTED AS A SPECIAL INSTRUMENT BY TWO ADJOINING LOT OWNERS, WHERE  
ITS CREATION IS NOT CONCURRENT  
WITH THE CONVEYANCE OF  
EITHER LOT.

State of .....,

County of .....

This indenture, executed this ..... day of .....,  
19..., by and between A. B., of the City of .....,  
County of ....., and State of ....., party of

the first part, and C. D., of the City of . . . . ., County of . . . . ., and State of . . . . ., party of the second part, Witnesseth:

That whereas the party of the first part is seised and possessed in his own right of a certain lot or parcel of land, situated in the City of . . . . ., County of . . . . ., and State of . . . . ., and designated on the map of said city as Lot . . . . . in Block . . . . ., fronting . . . . . feet on the . . . . . side of . . . . . Street in said city, while the East (?) side line of said lot runs back in a straight line . . . . . feet from said street:

And whereas the party of the second part is seised and possessed, in his own right, of another certain lot or parcel of land in said city, designated on the map of said city as Lot . . . . . in Block . . . . ., fronting . . . . . feet on the said . . . . . side of said . . . . . Street, and adjoining the aforescribed lot of the party of the first part, that is to say, the West (?) side line of said lot of the party of the second part being coincident with the East (?) side line of the said lot of the party of the first part, for a distance of . . . . . feet from the said street:

And whereas it is desired by both parties to this instrument that at any time a wall may be built upon the dividing line between the said lots, to be a party-wall, resting equally on each lot, and to be the supporting wall on one side for a building or buildings on each lot:

Now, therefore, in consideration of the covenants of the party of the second part hereinafter made and expressed, and one dollar in hand paid to the party of the first part by the party of the second part, the party of the first part hereby grants unto the party of the second part, his heirs and assigns, as a right appurtenant to the said lot of the party of the second part, the right to go to and fro upon the said lot of the party of the first part, and to carry servants and any materials, in any way necessary for the building of said wall.



And likewise the party of the second part in consideration of the covenants of the party of the first part, hereinafter expressed, and one dollar in hand paid to the party of the second part by the party of the first part, does hereby grant unto the party of the first part, his heirs, and assigns, as a right appurtenant unto the said lot of the party of the first part, a similar right or easement on or over the said lot of the party of the second part.

And each party, for himself, his heirs, executors, administrators and assigns, covenants with the other party, his heirs and assigns that either party, his heirs or assigns, first desiring to build such a wall, may do so at his own expense, and that the other party, his heirs, or assigns, who shall desire to use said wall for a support to a building, may do so, paying to the then owner of the building already supported by the wall one-half the cost of the wall to the extent so used.

And each party, for himself, his heirs, executors, administrators and assigns, covenants with the other party, his heirs and assigns, that if he or they shall so use the wall as a later builder than the other party, he or they will at the time of so using the wall, pay to the then owner of the building first supported by the wall, one-half the cost of the wall to the extent so used: and that the said wall, if built, may be repaired whenever necessary at the joint expense of the adjoining owners using it; and that it may be raised to any extent commensurate with the safety of the building on the lot other than that of which the owner desires to raise the wall, on the same conditions on which it was originally erected.

Witness our hands and seals this the ..... day of  
..... 19...

Witness:

A. B. (Seal.)

C. D. (Seal.)

.....  
.....

There may be doubt in any locality whether there may be dower against such an easement as is here granted. It is a somewhat different question from the question whether there may be dower in such an easement; and even about that there may be some doubt. The wording of Blackstone and Littleton, on account of their use of general words, very probably warrants dower. But Cooley, II Bl. Com. 132, n. 23, limits the language of Blackstone, though citing Buckeridge v. Ingram, 2 Ves. Jr. 664. In that case the Master of the Rolls, Sir Richard Pepper Arden, decided that the right to cut land along a water way in working upon the water way and keeping it up, was property in which there might be dower, according to Co. Lit. 32a.

Dower should therefore be released in making the above party-wall agreement.

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## APPENDIX B.

GENERAL FORM FOR ANY COVENANT IN A DEED INTENDED TO  
 RUN WITH LAND IN WHICH AN ACTIVE COVENANT  
 IS GIVEN FOR THE GRANTOR, AND A  
 NEGATIVE COVENANT FOR  
 THE GRANTEE.

State of Alabama,  
 County of Jefferson.

This indenture, made the ..... day of ....., 19..., by and between A. B., of the County of Jefferson and State of Alabama, party of the first part, and C. D., of the County of Jefferson and State of Alabama, party of the second part, Witnesseth:

That whereas the party of the first part is seised and possessed of a certain lot or parcel of land in the county aforesaid, containing three acres, more or less, lying in the S. E. quarter of the S. E. quarter of Section 29, Township

17 South, Range 2 West, fronting 400 feet on the south side of the Macadamized road, known as the ..... Road, and running back of even width 300 feet perpendicularly thereto:

And whereas the said party of the first part has agreed to sell to the party of the second part a certain portion of the said parcel of ground, that is to say, the east 100 feet fronting on said road, running back of equal width through the property, and the party of the second part has agreed to purchase the same from the party of the first part:

Now, therefore, the party of the first part for and in consideration of two thousand dollars (\$2,000), lawful money of the United States in hand paid him by said party of the second part, receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey to the said party of the second part and his heirs the said property above described, more particularly described as follows: (Here insert metes and bounds.)

Together with all and singular the hereditaments and appurtenances thereto belonging or in any ways appertaining.

To have and to hold unto the said party of the second part and his heirs to the sole and only proper use of the party of the second part and his heirs in fee-simple forever.

And the party of the first part, for himself, his heirs, executors and administrators, does covenant with the party of the second part, his heirs, executors, administrators and assigns (for title).

And the party of the first part, for himself, his heirs, executors and administrators, does covenant with the party of the second part, his heirs, executors, administrators and assigns that whereas there now exists upon the remaining portion of the said land owned by the party of the first part, a valuable overflowing, or Artesian well, from which pipes run carrying water to the parcel of land hereby conveyed,

he and the said party of the first part, his heirs and assigns, will keep the said well clean, and the pipes over his said remaining land open, so that the party of the second part, his heirs, or assigns may receive water, as long as there shall be no public water main along said road fronting said properties.

And the party of the second part, for himself, his heirs, and assigns, does covenant with the party of the first part, his heirs, executors, administrators, and assigns, that so long as the land now retained by the party of the first part shall be used for residence purposes only, the said party of the second part, his heirs and assigns, will use the parcel of land herein granted for residence purposes only.

Witness their hands and seals, this the ..... day of  
....., 19...

A. B. (Seal.)

Witness:

C. D. (Seal.)

.....  
.....

Dower should be released according to the local statutes regulating its release in the ordinary conveyance.

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